University of Alberta

An Appraisal of the Legal Frameworks of National Human Rights Institutions in Africa: The Cases of Tanzania and South Africa

by

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DEDICATION

This thesis is dedicated to:

My Parents: Gideon Kazimoto Magawa and Elizabeth Nyanjige Jacob—for your faithful love and diligent care all the years of my life.

ABSTRACT

This thesis aims at addressing legal limitations facing national human rights institutions in Africa. To achieve this aim, this thesis examines the current legal frameworks governing national human rights institutions in Africa in light of the United Nations Paris Principles. It establishes that most of African national human rights institutions have legal frameworks which limit their effectiveness and only a few have supportive provisions that invigorate effective performance of these institutions.

In particular, this thesis critically examines the legal frameworks of both South Africa's Human Rights Commission and Tanzania's Commission for Human Rights and Good Governance as case studies. In doing so, it identifies strong and weak provisions of their foundational legislation. Furthermore, it also considers a number of non-legal factors which can have significant impact on the effective performance of national human rights institutions in Africa.

This thesis recommends some legislative amendments so as to strengthen the legal frameworks of South Africa's Human Rights Commission and Tanzania's Commission for Human Rights and Good Governance and similar institutions elsewhere in Africa.

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List of Acronyms

AU	-	African Union
TCHRGG	-	Tanzania's Commission for Human Rights and Good Governance
ECOSOC	-	Economic and Social Council
HHRO	-	Hybrid Human Rights Ombudsman
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICJ	-	International Court of Justice
ICC	-	International Criminal Court
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the Former Yugoslavia
NHRI	-	National Human Rights Institution
NHRIs	-	National Human Rights Institutions
HRC	-	Human Rights Commission
HRCs	-	Human Rights Commissions
NGO	-	Non-Governmental Organization
OHCHR	-	Office of the United Nations High Commissioner for Human Rights
OAU	-	Organization of African Unity
OAS	-	Organization of American States
SAHRC	-	South Africa Human Rights Commission
UN	-	United Nations
UDHR	-	Universal Declaration of Human Rights

CHAPTER ONE

INTRODUCTION

Creating national human rights institutions (NHRIs) has become a highly fashionable step taken by many of the world's governments. Over the past two decades, NHRIs have sprung up across the globe and are now an intrinsic part of the domestic institutional landscape.[1] Encouraged by international actors[2] and executed by domestic players, countries with varying social and political backgrounds have moved to set up these institutions.

NHRIs gained prominence after the United Nations (UN) began actively to promote the concept. In 1991, the UN Centre for Human Rights organized a consultative meeting on NHRIs.[3] One of the results of this meeting was a statement of principles entitled *Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights* (Paris Principles).[4] In 1992, the Paris Principles were endorsed by the UN Commission on Human Rights and, subsequently, in 1993 by the UN General Assembly and the Vienna World Conference on Human Rights.[5]

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[1] United Nations Centre for Human Rights, *National Institutions for the Promotion and Protection of Human Rights: Fact Sheet No. 19* (New York: Centre for Human Rights, 1993) at 2 [*Fact Sheet No. 19*].
[2] United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Protection and Promotion of Human Rights Professional Training Series No.4* (New York: Centre for Human Rights, 1995) at 4-6 [*Handbook*].
[3] See *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: National Institutions for the Promotion of Human Rights*, UN ESCOR, 48th Sess., Agenda Item 11(b), E/CN.4/1992/43 and Add. 1. (1992) at 1.
[4] *Resolution Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights*, G.A. Res. 48/134, UN GAOR, 48th Sess., 85th mtg., UN Doc. A/RES/48/134 (1993) [*Paris Principles*].
[5] *United Nations Commission on Human Rights Resolution* 1992/54 (March 3, 1992); *Official Records of the Economic and Social Council*, 1992, Supp. No.2, E/1992/22, Annex 1 [endorsing the Paris Principles]; *Vienna Declaration and Programme of Action*, UN GAOR, World Conference on Human Rights, 48th Sess., 22nd mtg., para. 36; 32 I.L.M. 1661 (1993), para. 36, in which the Declaration states, *inter alia*,

The Paris Principles contain guiding standards and principles that should be followed by states when they are establishing or strengthening their own NHRIs. Amnesty International, a non-governmental organization (NGO), has also issued guidelines for NHRIs.[6] Amnesty International argues that while NHRIs can be important mechanisms for the protection and promotion of human rights they can never replace and should not in any way diminish the legal structure maintained by an independent and impartial judiciary.[7]

There are different forms of NHRIs and they can be classified into four main types, namely: the human rights commission; the ombudsman; hybrid models e.g. the human rights ombudsman; and specialized institutions.[8] The focus of this thesis will be on NHRIs in Africa in general and on the legal frameworks of two African NHRIs with express human rights mandates in particular: the Human Rights Commission of South Africa, an example of a human rights commission, and the Commission for Human Rights and Good Governance of Tanzania, representing a hybrid human rights ombudsman.

South Africa was chosen because in the 1990s it changed from an undemocratic apartheid regime to a democratic government and has since restructured its national institutions to uphold human rights protection.[9] The South African Human

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"...[T]he World Conference encourages the establishment and strengthening of national institutions having regard to the Principles relating to the status of national institutions ...". [*Vienna Declaration and Programme of Action*].

[6] Amnesty International, online: Amnesty International's Recommendations for Effective Protection and Promotion of Human Rights <http://web.amnesty.org/library/index/ENGIOR400072001> [last visited December 1, 2005].

[7] *Ibid.*

[8] Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff Publishers, 2004) at 83 [*Ombudsman*].

[9] Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harv. Hum. Rts. J. 1 at 64 [Reif].

Rights Commission is one of the strongest NHRIs in Africa.[10] However, it is not completely free of flaws. Tanzania was chosen because in the mid-1980s it experienced major socio-economic changes which resulted in a move from a one-party political system to a multiparty system in the 1990s.[11] These changes led to the need for reforms in government institutions and improvement in governance.[12] While Tanzania was the second country to establish a NHRI in the Commonwealth and, more importantly, the first NHRI in Africa,[13] due to reform process of the 1990s, Tanzania's office changed from a classical ombudsman to a hybrid human rights ombudsman in 2000.[14] Despite this change, Tanzania's new NHRI exhibits some weaknesses which appear to be common to many NHRIs in Africa.

Despite the efforts of various governments in Africa to create NHRIs, violations of human rights in Africa remain at alarming levels. However, there is general acknowledgement of the crucial role being played by some of the NHRIs in Africa.[15] Others, by contrast, are weak and appear to operate as mere façades to

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[10] B. Nowrojee & Human Rights Watch, *Protectors or Pretenders?: Government Human Rights Commissions in Africa* (New York: Human Rights Watch, 2001) at 5 [Human Rights Watch].
[11] Max Mmuya and Amon Chaligha, *Towards Multiparty Politics in Tanzania: A Spectrum of the Current Opposition and the CCM Response* (Dar es Salaam: DUP, 1992) at 46. See also Mohammed Halfani and Maria Nzomo, *Towards A Reconstruction of State-Society Relations: Democracy and Human Rights in Tanzania* (Montreal, Québec: International Centre for Human Rights, 1995) at 5 [Halfani and Nzomo].
[12] UN-Habitat, *Local Democracy and Decentralization in East and Southern Africa: Experiences from Uganda, Kenya, Botswana, Tanzania, and Ethiopia* (Nairobi: UN-Habitat, 2002) at 69.
[13] Richard Carver and Paul Hunt, "National Human Rights Institutions in Africa" in Kamal et al., eds., *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World* (London: Kluwer Law International, 2001) at 735 [Kamal]. See also V. Ayeni, L. Reif & H. Thomas, eds., *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (London: Commonwealth Secretariat, 2000) at 160.
[14] Venessa Brocato, "National Human Rights Commissions: Ghana, Uganda, and Tanzania" in Johanna Bond, ed., *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* (Durham: Carolina Academic Press, 2005) at 400 [Brocato]. See also Leonard G. Magawa, "Tanzania's Commission for Human Rights and Good Governance: A Critique of the Legislation" in Linda C. Reif, ed., *International Ombudsman Yearbook*, vol. 6 (Boston: Martinus Nijhoff Publishers, 2002) at 102.
[15] Human Rights Watch, *supra* note 10 at 5.

deflect international criticism. There are many reasons behind this polarization of the level of effectiveness of NHRIs in Africa.

For NHRIs to operate effectively, many stakeholders, including the UN, place emphasis on compliance with the Paris Principles. This thesis argues that one of the factors detracting from the effectiveness of NHRIs in Africa is a failure to put in place strong legal frameworks based on the Paris Principles capable of supporting NHRIs in the protection and promotion of human rights. Therefore, all legal provisions which undermine the effectiveness of these institutions need to be reformed.

In particular, this thesis examines the extent to which the constitutional provisions and the statutes establishing both the South Africa Human Rights Commission (SAHRC) and Tanzania's Commission for Human Rights and Good Governance (TCHRGG) comply with the Paris Principles. In addition, this thesis explores and analyzes those features of their legal frameworks which strengthen their effectiveness. While the SAHRC is a relatively independent NHRI compared to the TCHRGG, the legal frameworks of both NHRIs deviate in some respects from the Paris Principles. Aspects of the legal frameworks that act to weaken the effectiveness of the two institutions are also discussed. This thesis contends that the legal frameworks of both institutions offer mixed messages about the appropriate structures of NHRIs in Africa. On the one hand, both legal frameworks do have strong features which support the effective functioning of the two NHRIs and which could be adopted by similar institutions in Africa. On the other hand, both legal frameworks contain limiting features which potentially detract from the independence and effective performance of the two NHRIs. Indeed, the legal frameworks of most NHRIs in

Africa contain provisions which inhibit their effectiveness. I further argue that an examination of most of the current legal frameworks of African NHRIs indicate that they only partly comply with the Paris Principles. I also address a variety of non-legal factors which can affect the independence and effectiveness of NHRIs. These non-legal factors are applied to the NHRIs in Tanzania and South Africa.

In conclusion, this thesis recommends amendments to the laws establishing the TCHRGG and SAHRC in order to strengthen them. It also argues that comparable NHRIs elsewhere in Africa would benefit from the application of these recommendations.

This thesis is organized into six chapters. Chapter Two provides an overview of the international protection of human rights. Traditional domestic institutions involved in the protection and promotion of human rights and the place of NHRIs within national institutional structures will also be discussed. Chapter Two moves on to trace the genesis and development of the support for NHRIs within the UN system and provides an overview of the general structure of the different types of NHRIs.

Chapter Three gives an overview of the historical background of the human rights situation in Africa, the evolution of NHRIs in Africa, and the growth of these institutions. The role of stakeholders, especially states and international donors whose financial and technical support augmented the development of NHRIs in Africa will also be discussed.

Chapter Four critically examines the legal framework of the TCHRGG, including the historical background behind the eventual establishment of this hybrid human rights ombudsman (HHRO) in 2000. In addition, the chapter examines the

composition and the qualifications required of the TCHRGG members, as well as other facets of its mandate and operations. In discussing these features, I argue that despite the longevity of the existence of the ombudsman in Tanzania, and notwithstanding the conversion of the traditional ombudsman model into a HHRO model, the legal framework on which the new TCHRGG operates has a number of provisions which limit the effectiveness of the TCHRGG and deviate from the Paris Principles.

Chapter Five critically reviews the legal framework of the SAHRC. The historical background leading to the establishment of the SAHRC is provided and various aspects of the SAHRC's mandate and operations are discussed. This chapter argues that, although the SAHRC is considered as one of the strongest NHRIs in Africa given that a number of provisions in its governing law comply with the Paris Principles, it nevertheless has weaknesses which can potentially impinge on the effective operation of the SAHRC.

Finally, Chapter Six provides a synopsis of the main arguments of this thesis and introduces recommendations for measures which, if incorporated into the laws governing the NHRIs in Tanzania and South Africa, should serve significantly to reduce the provisions in these statutes which do not comply with the Paris Principles and act to limit the effectiveness of both institutions. Chapter Six also argues that these recommendations could be usefully adopted in the legal frameworks of similar NHRIs elsewhere in Africa.

CHAPTER TWO

INTERNATIONAL HUMAN RIGHTS PROTECTION AND NATIONAL HUMAN RIGHTS INSTITUTIONS

1. An Overview of International Human Rights Law

A. Background

The atrocities of the Second World War shocked the world and fostered both the recognition that basic human rights were important for maintaining international peace and security and the desire to create the means for upholding them.[16] The implications of the Second World War Holocaust Nazi atrocities and the tremendous abuses in various areas of human rights provided a strong basis for building international law on human rights.[17]

B. Post-1945 Normative Foundation of International Human Rights Law

The normative basis of contemporary international human rights law began with the adoption of the United Nations Charter (hereinafter the UN Charter) in 1945.[18] Since the UN Charter provisions on human rights were weak in their generality, there was a need to draft a separate document, one which would frame an International Bill of Human Rights. During the drafting stage of the International Bill of Human Rights, there were two opposing schools of thought on its form and

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[16] Manfred Nowak, *Introduction to the International Human Rights Regime* (Boston: Martinus Nijhoff Publishers, 2003) at 23 [Nowak].

[17] Mark Freeman and Gibran Van Ert, *International Human Rights Law* (Toronto, Ontario: Irwin Law Inc., 2004) at 19.

[18] *Charter of the United Nations*, June 26, 1945, Can. T. S. 1945 No. 7. The UN Charter contains several references to the promotion of human rights in its Preamble and in Arts. 1, 1(3), 13, 55, 56, 68, and 76. Although the UN Charter contains provisions which generally seek to encourage and promote respect for human rights and fundamental freedoms it neither defines the content of basic human rights and fundamental freedoms nor provides measures for their implementation [*UN Charter*].

contents.[19] The resulting International Bill of Human Rights is composed of the Universal Declaration of Human Rights,[20] International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR"),[21] International Covenant on Civil and Political Rights (hereinafter "ICCPR"),[22] and the two Optional Protocols to the ICCPR.[23] There are also a wide ranging number of other human rights treaties, declarations, and guidelines adopted by the UN.[24]

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[19] As to the issue of form, one bloc wanted a declaration and the opposing bloc wanted a binding convention. It was agreed by both blocs that the International Bill of Human Rights should take three forms: a declaration, convention, and implementation measures. As to the issue of contents, one bloc put emphasis on civil and political rights, and the opposing bloc put more priority on economic, social, cultural rights and the right to self-determination. It was ultimately agreed that two different conventions be adopted, one should contain civil and political rights and the other one should contain economic, social and cultural rights.(See Javaid Rehman, *International Human Rights Law: A Practical Approach* (Edinburgh: Pearson Education Limited, 2003) at 54 & 63)[Rehman].

[20] *Universal Declaration of Human Rights*, G.A. Res. 217(III), UN GAOR, Supp.No. 13, UN Doc. A/810 (1948) at 71. It contains extensive provisions within which are grounded essentially two sets of human rights. Arts, 1 to 21 provide for traditional civil and political rights, whereas provisions for economic and social rights are contained in Arts, 22 to 28. Although this General Assembly resolution is not legally binding on UN member states, it sets out international standards of achievement to be attained by all nations. Accordingly it provides the normative basis for other UN General Assembly resolutions and treaties concerning human rights.

[21] *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 49, UN Doc. A/63/6(1966), 993 U.N.T.S. 3, entered into force January 3, 1976 [*ICESCR*]. It provides for "second generation" rights. These rights can briefly be categorized into three groups: first, those rights which protect and promote the right to work in just and favourable conditions, second, those rights which safeguard the means to social protection, an adequate standard of living, and the highest attainable standards of physical and mental health, and third, those rights which provide for the right to education and to enjoyment of the benefits of cultural freedom and scientific progress (see United Nations, Centre for Human Rights, *The Committee on Economic, Social and Cultural Rights: Fact Sheet No.16* (New York: Centre for Human Rights, 1991) at 6 [*Fact Sheet No.16*].

[22] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 UN GAOR Supp.(No.16) at 52, UN Doc.A/63/6 (1966), 999 U.N.T.S. at 171, entered into force March, 23, 1976 [ICCPR]. It provides for "first generation" civil and political rights. Art. 28 of *ICCPR* establishes the UN Human Rights Committee which examines periodic state reports on matters regarding the implementation of the ICCPR.

[23] *First Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 59, UN Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976, which gives the Human Rights Committee the mandate to receive communications from individuals claiming to be victims of violations by the ICCPR state parties, and *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of Death Penalty*, G.A. Res. 44/128, Annex, 44 UN GAOR Supp. No.49, at 207, UN Doc. A/44/49 (1989) entered into force July 11, 1991.

[24] See Office of the UN High Commissioner for Human Rights, online: Universal Human Rights Instruments < http://www.ohchr.org/english/law/index.htm> [last visited November 22, 2005].

C. UN Human Rights Institutional Structure

The UN has six main organs, including the Economic and Social Council (hereinafter "ECOSOC").[25] ECOSOC and its subsidiary bodies are directly charged with the responsibility of promoting respect for and protection of human rights and fundamental freedoms.[26] In 1946, the ECOSOC established the UN Commission on Human Rights.[27] In 1993, the UN General Assembly passed a resolution to establish the Office of the High Commissioner for Human Rights (hereinafter OHCHR).[28] The flaws in the UN human rights system regarding the protection and promotion of human rights[29] and in human rights activities at the national level contributed to the support for the establishment of the OHCHR.[30]

The OHCHR recently initiated a program that provides advisory services and technical and financial support to countries in the process of setting up NHRIs and, as a result of such support, numerous countries have been able to establish NHRIs.[31] To

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[25] These organs are the: General Assembly, Security Council, Secretariat, International Court of Justice, Trusteeship Council (operations suspended), and Economic and Social Council (ECOSOC).

[26] *UN Charter, supra* note 18, Arts. 57, 62, and 64. These provisions empower the ECOSOC to make recommendations on promoting respect for and protection of human rights. It is also empowered to make arrangements with member states and specialized agencies to give effect to its recommendations on human rights and those of the UN General Assembly.

[27] *ECOSOC Resolution Establishing the Commission on Human Rights*, E/RES/9 (II), June 21, 1946. Its mandates include the preparation of human rights policies, drafting of human rights conventions and declarations, protection and promotion of human rights, handling communications relating to human rights issues, carrying out some studies on human rights issues, and making recommendations regarding human rights, see United Nations, Centre for Human Rights, *Human Rights Machinery: Fact Sheet No.1* (New York: Centre for Human Rights, 1990) at 7*[Fact Sheet No.1]*. See also the Sub-Commission for Protection and Promotion of Human Rights of the ICCPR rights, various working groups on human rights issues, representatives, and special rapporteurs.

[28] *United Nations High Commissioner for the Promotion and Protection of Human Rights*, G.A. Res. 48/141, 85th plenary mtg., (December 20, 1993), Art. 1 [*OHCHR Resolution*]. This office is tasked with the overall responsibility for overseeing the UN human rights activities under the direction and authority of the UN Secretary-General.

[29] See Roger Stenson Clark, *A United Nations High Commissioner for Human Rights* (The Hague: Martinus Nijhoff, 1972) at 38.

[30] *OHCHR Resolution, supra* note 28, para. 1.

[31] Bertrand G. Ramcharan, *The United Nations High Commissioner for Human Rights: The Challenges of International Protection* (London: Martinus Nijhoff Publishers, 2002) at 175 [Ramcharan].

boost and coordinate the activities of NHRIs at the international level, the International Coordinating Committee of NHRIs was created in 1993, comprising representatives from all regions of the world.[32]

D. Methods of Lodging a Complaint before UN bodies

The UN has devised various ways of bringing human rights complaints before UN bodies. These complaint procedures can be classified into two groups, namely complaint and judicial mechanisms. There are various ways of bringing a complaint before UN bodies under the UN complaint mechanisms including: the Resolution 1503 procedure,[33] special procedures through rapporteurs/independent experts, and the lodging of complaints with UN treaty committees if the prerequisites for a petition have been satisfied.[34] All of the UN complaint mechanisms are non-judicial in nature and therefore do not result in decisions legally binding on states concerned.

Also, there are four UN judicial bodies: the International Court of Justice (ICJ),[35] the International Criminal Court (ICC),[36] the International Criminal Tribunal

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[32] *National Institutions for the Promotion and Protection of Human Rights*, G.A. Res. 58/175, UNGAOR, 58th Sess., 175th Mtg., Agenda 117(b) (December 22, 2003) U.N. Doc. A/RES/58/175, para. 13.

[33] United Nations Centre for Human Rights, *Complaint Procedures Fact Sheet No.7* (New York: Office of the United Nations High Commissioner for Human Rights, 2002) at 26 [*Fact Sheet No.7*].

[34] The core UN human rights treaties have committees of experts whose main function is to monitor the implementation of their respective treaties. There are seven human rights treaty committees, five of which can receive individual complaints (only the CRC and CESRC cannot receive individual complaints). These committees are CERD (Committee on the Elimination of Racial Discrimination), CAT(Committee Against Torture), HRC (Human Rights Committee), CEDAW (Committee on the Elimination of Discrimination Against Women), CRC (Committee on the Rights of the Child), CMW (Committee on Migrant Workers), and CESCR (Committee on Economic, Social and Cultural Rights).

[35] *UN Charter*, *supra* note 18, Art. 92, establishes the ICJ as the principal judicial organ of the UN. The ICJ is not a specialized human rights court. The ICJ's jurisdiction does enable it to hear and determine cases of a human rights nature when such issues arise in contentious cases and advisory opinions, (see *ICJ Statute*, Arts. 34-37 and Art. 93(1) of the *UN Charter* (jurisdiction in contentious cases) and *ICJ Statute*, Art. 65(1) and Art. 96(1) of the *UN Charter* (advisory jurisdiction). See the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (2004), ICJ Rep. Annex II, at 15, in which the legality of the construction of the barrier within the occupied Palestinian territory was questioned. It was argued, *inter alia*, that the construction of the barrier infringed freedom of movement contrary to the ICCPR, and the right to education, work, and adequate standard of living and health care contrary to the Convention on the Rights of the Child and the ICESCR.

for Rwanda (ICTR),[37] and the International Criminal Tribunal for the former Yugoslavia (ICTY).[38]

E. Regional Human Rights Mechanisms

The international human rights movement also includes regional human rights systems for the protection and promotion of human rights. The three regional human rights systems are the European, Inter-American, and African systems.[39] The African human rights system will be discussed below in Chapter Three.

2. Human Rights Protection on the National Stage

A. Introduction

While states are considered indispensable guarantors of the human rights of individuals within their jurisdiction, historical experience shows that the same

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[36] In 1998, the UN established the ICC by treaty to ensure that gravest international crimes are punished, see *UNGA Resolution on the Establishment of an International Criminal Court*, GA. Res., A/RES/53/105(1999), para.11. The jurisdiction of the ICC is limited to crimes of genocide, crimes against humanity, war crimes, and the crime of aggression, See *Rome Statute of the ICC*, UN Doc. 2187 U.N.T.S. 90, adopted in July 17, 1998 and entered into force July 1, 2002, Art. 5(1).

[37] The ICTR was established by *UN Security Council Resolution No.955, on Establishment of an International Tribunal and adoption of the Statute of the Tribunal*, S/RES/955, 3453rd mtg., (1994), adopted November 8, 1994.

[38] The ICTY was established by the *UN Security Council Resolution No.827*, S/RES/827, 3217th mtg., (1993), adopted May 25, 1993.

[39] For Europe see Council of Europe, the European Union and the Organization for Security and Cooperation in Europe. In particular, the *European Convention on Human Rights and Fundamental Freedoms*, (Eur.T.S.No.05) 213 U.N.T.S. 222, adopted November 4, 1950 and entered into force September 3, 1953, as amended by its Protocols. For a list of other Council of Europe's human rights treaties, see Council of Europe, online: Complete list of the Council of Europe's Treaties <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> [last visited November 22, 2005]. The Inter-American human rights system is organized under the Organization of American States. In particular, see *Charter of the Organization of American States*, adopted April 30, 1948, entered into force December 13, 1951, O.A.S.T.S. Nos.1-C and 61 as amended by its various Protocols, *American Declaration of the Rights and Duties of Man*, O.A.S Res., XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6.rev.1, 17 (1992), *American Convention on Human Rights*, O.A.S.T.S. No.36 adopted November 22, 1969, entered into force July 18, 1978 and other Inter-American human rights treaties, see Office of Inter-American Law and Programs: Department of International Legal Affairs, online: Text of the Inter-American Treaties by Subject <http://www.oas.org/juridico/english/treasub.htm> [last visited November 22, 2005].

governments often infringe upon these rights.[40] Thus, effective protection of human rights must be solidly built inside states. Domestic protection of human rights must involve those national institutions which are responsible for guaranteeing both the implementation and the enforcement of human rights in a state. National human rights protection also involves recognition and entrenchment of human rights in a country's basic legal instruments such as its constitution, statute law, and jurisprudence.[41] In those jurisdictions which follow a monist approach to the domestic application of international law, international law obligations are automatically assumed as part of the domestic legal system.[42] In states which follow a dualist approach, however, international law obligations must be transformed into domestic law through the constitution or the enactment of a statute implementing the international law obligations.[43]

B. Principal Government Institutions

Traditionally, national institutions responsible for the protection of human rights at the national level are those representing the three pillars of state: the legislature, judiciary, and executive.

1. Legislature

The functions of the legislature are normally three-fold. First, it is responsible for law-making and, through the process of enacting laws, has a central role in making

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[40] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) at 84 [Tomuschat].
[41] Jean-Bernard Marie, "National Systems for the Protection of Human Rights" in Januz Symonides, ed., *Human Rights: International Protection, Monitoring, Enforcement* (Paris: Ashgate Publishing Company, 2003) at 258 [Marie].
[42] *Ombudsman*, *supra* note 8 at 104.
[43] *Ibid.*

sure that laws which it passes do promote and protect human rights.[44] Second, it also exercises overall financial control, a condition that makes it necessary for a government to seek approval from the legislature for its annual budget.[45] It is through budgetary control over government expenditure that the legislature can ensure that funds allotted for human rights activities are utilized accordingly. Also, budgetary control is a vital prerequisite for ensuring accountability in the way government bodies conduct themselves. Third, sessions of the legislature provide a forum for the nation, through their democratically elected representatives, to debate government policies and actions. The same forum can be used to criticize government policies and actions that violate human rights. However, legislatures sometimes pay little attention to human rights issues because of the numerous other matters on the legislative agenda or because legislators do not place a high priority on human rights matters.

2. Judiciary

The primary function of the judiciary is to adjudicate legal disputes, and interpret and apply laws. However, the effectiveness of the judiciary depends upon many factors, including its independence and impartiality, and the competence of its members.[46] Once human rights are entrenched into a country's constitution and other laws, the judiciary plays a role in protecting human rights by ensuring that, in the event of a violation of human rights, every victim of human rights abuse has a right to an effective remedy.[47] However, there are various factors which can hinder victims of human rights violations from obtaining effective judicial redress. For example, outside

[44] Marie, *supra* note 41 at 260.
[45] Robert Blackburn, Andrew Kennon and Michael Wheeler-Booth, *Griffith & Ryle on Parliament: Functions, Practice and Procedures*, 2nd ed. (London: Sweet & Maxwell, 2003) at 7.
[46] Marie, *supra* note 41 at 261.
[47] *Ibid.*

the criminal law area, human rights victims often cannot afford the expense of civil or constitutional litigation.

3. Executive

The executive oversees the machinery responsible for enforcing laws. Through its execution of laws, the executive and its bureaucracy have a role in ensuring that enforcement of laws promotes the observance and protection of human rights. Also, the executive has the responsibility to make sure that necessary measures are taken to ensure respect for and protection of human rights.[48] However, the executive or administrative branch of government is often the violator of individual human rights. In the situation where there are few domestic human rights laws, then the executive has less obligations to enforce laws according to human rights. Further, it should be noted that the executive branch in some countries also has the jurisdiction to pass decrees and can be more powerful than the legislature. This scenario is problematic for human rights protection in less democratic or non-democratic nations.

C. National Human Rights Institutions

Beyond the traditional institutions of government, NHRIs are increasingly being established to play a complementary role in sustaining human rights. These bodies take different forms but bear many similar characteristics. They also serve to introduce new approaches to and methods of protecting and promoting human rights at the national level.[49]

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[48] *Ibid.* at 262.
[49] Marie, *supra* note 41 at 264.

3. United Nations' Focus on National Human Rights Institutions

A. National Human Rights Institutions and their Origins

A NHRI refers to those bodies centrally concerned with promotion and protection of human rights at the national level.[50] These bodies are established and sponsored by government.[51] They act as non-judicial domestic mechanisms for human rights promotion and protection and are designed to be supplementary to judicial protection.[52] The concept of a NHRI does not include administrative tribunals, legislative organs, non-governmental organizations, legal aid offices, courts, government departments, and welfare organizations.[53]

As noted in Chapter One, NHRIs can be human rights commissions, ombudsmen, hybrid human rights ombudsmen, and specialized institutions. There are both differences and similarities among NHRIs.[54] They are usually created under the national constitution and/or in a statute, although a few are established by executive decree. In some jurisdictions, NHRIs are established under a national constitution together with a statute that provides detailed information regarding the powers and functions of the institution.[55] Their key functions are in:

> [p]roviding human rights expertise to Governments and Parliaments; investigating individual human rights violations; conducting public inquiries into systematic or structural violations; and fostering human rights education.[56]

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[50] *Handbook*, *supra* note 2 at 6, para. 39. See also B. Burden and A. Gallagher, "The United Nations and National Human Rights Institutions" in G. Alfredsson & et al., eds., *International Human Rights Monitoring Mechanisms* (The Hague: Kluwer Law International, 2001) at 815.
[51] *Handbook*, *supra* note 2 at 6, para. 39.
[52] Vijayashri Sripati, "India's National Human Rights Commission" A Shackled Commission?" (2000)18 B. U. Int'l L. J. 1 at 3.
[53] *Handbook*, *supra* note 2 at 6, para. 36.
[54] *Fact Sheet No. 19*, *supra* note 1 at 5.
[55] John Hatchard, *National Human Rights Institutions Manual* (London: Human Rights Unit, 1993) at 6 [*Manual*].
[56] United Nations Department of Public Information, *Human Rights Today: A United Nations Priority*

Given the nature of these functions, such institutions are neither judicial nor legislative but rather are administrative in nature.[57] In federal states, NHRIs can be established at the national and/or provincial/state levels.[58]

The establishment and strengthening of NHRIs in every country has been a long-term concern of the UN. NHRIs were first proposed and discussed in 1946,[59] at about the same time as the UDHR was being drafted and discussed.[60] The UN actively promoted the establishment of NHRIs because its mandate and functions as an international organization were circumscribed.[61] Given the limited mechanisms for human rights protection at the international level, the implementation of international human rights standards required mechanisms at the global, regional, and national levels.

It is without doubt that human rights protection at the national level is the most critical.[62] Significantly, the UN considers that NHRIs create a link between international human rights standards and municipal law by facilitating the implementation of international human rights norms into their respective local cultures without losing in this process the substance of international human rights

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(New York: United Nations Department of Public Information, 1998) at 27 [*Human Rights Today*].

[57] *Handbook*, *supra* note 2 at 6, para. 40.

[58] Reif, *supra* note 9 at 6.

[59] *Handbook*, *supra* note 2 at 4, para. 20. ECOSOC, in its resolution 2/9 June 21, 1946 s. 5, called on member states "...to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights...".

[60] Canadian Human Rights Foundation and Philippine Commission on Human Rights, *National Human Rights Institutions at Work: The Role of National Human Rights Commissions in the Promotion and Protection of Economic, Social, and Cultural Rights* (Montreal: Canadian Human Rights Foundation, 1999) at 13.

[61] *UN Charter*, *supra* note 18, Art. 2(7).

[62] Vijayashri Sripati, " A Critical Look at the Evolving Role of India's National Human Rights Commission in Promoting International Human Rights Law" in Linda C. Reif, ed., The *International Ombudsman Yearbook*, vol. 5 (London: Kluwer Law International, 2001) at 164 [*Critical Look*].

standards.[63] They are considered as key means of access for individuals and groups to make human rights complaints against government and private actors. NHRIs are rooted in local cultures in such a way that, ideally, they can best protect and uphold international human rights norms.[64] The UN acknowledges that NHRIs can effectively protect and promote human rights in a more informed manner and with greater attention to local cultural sensitivities compared to international or regional mechanisms.[65]

The World Conference on Human Rights, held in Vienna in June 1993, reinforced three important points regarding NHRIs.[66] It reaffirmed:

> [T]he important and constructive role played by national institutions for the promotion and protection of human rights, in particular their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.[67]

It further encouraged "...the establishment and strengthening of national institutions...".[68] The Conference also recognized "...the right of each State to choose the framework which is best suited to its particular needs at the national level...".[69] The commitments made during the Vienna Conference, it can be argued, lent further force to the establishment and strengthening of NHRIs in different countries.

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[63] *Human Rights Today, supra* note 56 at 27.
[64] Mary Ellen Tsekos, "Human Rights in Africa" (2002) 9 Human Rights Brief 21 at 21 [Tsekos].
[65] *Human Rights Today, supra* note 56 at 27.
[66] *Vienna Declaration and Programme of Action, supra* note 5, para. 36.
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*

B. National Human Rights Commissions

A human rights commission (HRC) is a state-sponsored and state-funded entity set up under a constitution, or by legislative act or by executive decree.[70] Its functions are concerned with the protection and promotion of human rights.[71] A HRC may perform a range of functions, including advising governments on human rights issues, monitoring human rights violations, engaging in documentation and research,[72] providing human rights education, investigating complaints, dispute resolution,[73] reviewing domestic legislation, and monitoring state legislative compliance with both international and national human rights regimes.[74]

Many human rights commissions (HRCs) have investigatory powers,[75] while others are advisory bodies without powers of investigation.[76] For those with investigatory powers, some can take complaints against both the public and private sectors, whereas others are confined to one sector.[77] Some HRCs can launch *suo moto* (own motion) investigations, while others have their investigatory powers limited to certain matters such as discrimination,[78] and others cannot investigate certain categories of public office holders.[79] Many HRCs apply amicable means (such as conciliation) to settle disputes and, after investigating, HRCs usually make

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[70] Mario Gomez "Sri Lanka's New Human Rights Commission" (1998) 20 Hum. Rts. Q. 281 at 281 [Gomez].
[71] Reif, *supra* note 9 at 10. See also *Handbook*, *supra* note 2 at 7, para. 42; Brice Dickson, "Ireland's Human Rights Commission" (2001) 36 Ir. Jur. 265 at 265.
[72] Gomez, *supra* note 70 at 281.
[73] *Fact Sheet No.19*, *supra* note 1 at 7. See also Reif, *supra* note 9 at 10.
[74] *Handbook, supra* note 2 at 8, para. 51.
[75] *Ibid.*, para. 49.
[76] E.g. France, Algeria, and a number of African states such as Cape Verde, Morocco, Tunisia, Sierra Leone, Chad, Mauritania, and Senegal.
[77] Reif, *supra* note 9 at 10.
[78] E.g. Canadian Human Rights Commission, British Equal Opportunities Commission and Commission on Racial Equality.
[79] E.g. the head of state, head of government, members of the judiciary, and members of military forces.

recommendations and some have a further option to refer disputes to courts or tribunals. Some have the power to appear in courts or tribunals as *amicus curiae* or representing complainants.[80] A few have means to enforce their own decisions.[81] Some base their functions on international human rights instruments.[82]

In order to maintain their statutory independence and autonomy, members of NHRCs are drawn from various backgrounds, but preference is generally given to candidates with prior experience in the area of human rights.[83] In some countries where the executive maintains some control over the HRC, the process of appointing members to these institutions involves various government departments and ministries, although sometimes civil society organizations are involved.[84] In other countries, appointments to these bodies are made by the legislature.[85] Investigation procedures undertaken by HRCs vary from country to country. In most cases, the decisions of HRCs are non-binding on the parties involved.[86] However, if the parties to the case ignore implementing suggested recommendations, some of the HRCs have the authority to resort to other institutions (e.g. tribunals, courts) for either adjudication or prosecution of the matter or enforcement of the determination.[87] Many HRCs enjoy statutory independence and are usually responsible and report to the

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[80] *Ombudsman, supra* note 8 at 85.
[81] *Ibid.*
[82] *Ibid.*
[83] A.K. Palai, *National Human Rights Commission of India: Formation, Functioning and Future Prospects* (New Delhi: Atlantic Publishers and Distributors, 1999) at 40 [Palai]. For instance, In Japan, the Ministry of Justice is responsible for selecting members of the Commission from among the Civil Liberties Bureau's eight offices across the country. The eight offices have people with different professional backgrounds including social workers, school teachers, lawyers, and journalists.
[84] *Ibid.*
[85] E.g. in Africa, this is done in Togo, Ethiopia, South Africa, and Rwanda.
[86] *Handbook, supra* note 2 at 7, para. 50.
[87] Reif, *supra* note 9 at 11. E.g. in Canada decisions of HRCs may be referred to human rights tribunals for prosecution.

legislature on regular and *ad hoc* bases.[88] However, a number of HRCs are responsible and report to the executive branch.[89]

One of the noticeable functions of these bodies is their power systematically to review existing government policies in light of human rights protection and to suggest improvements or rectifications.[90] Some engage in monitoring state legislative compliance with both international and national human rights regimes.[91] Many engage in the dissemination of public education, especially on human rights treaties to which their countries are parties.[92] Others engage in enlightening the general public on their functions and purposes, as well as on various issues in the field of human rights.[93] They typically fulfil these functions by presenting seminars, distributing periodic reports, conducting studies, and preparing bulletins. In some countries, HRCs are established with the sole purpose of carrying out promotional and educational responsibilities concerning human rights.[94]

C. The Ombudsman

An ombudsman is a special body or officer preferably established by the legislative branch of government to receive and deal with people's grievances against government administration.[95] While most ombudsmen are appointed by the

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[88] *Handbook*, *supra* note 2 at 17, para. 137.
[89] E.g. in Kenya, Mauritius, Nigeria, South Africa, and Zambia.
[90] *Handbook*, *supra* note 2 at 7, para. 51.
[91] E.g. in Cape Verde, Kenya, Malawi, and Uganda.
[92] E.g. the Australian Human Rights and Equal Opportunity Commission, Uganda Human Rights Commission, and Kenya National Commission on Human Rights.
[93] The Australian Human Rights and Equal Opportunity conducted several public inquiries on various areas with a view to enlightening the public on those issues. For instance, it conducted inquiries into homeless children, racist violence, and human rights of people with mental illness.
[94] E.g. Surinam Human Rights Commission.
[95] *Ombudsman*, *supra* note 8 at 3. See also Reif, *supra* note 9 at 9. The word ombudsman means "representative" and is accepted as gender neutral in the Swedish language.

legislature, some ombudsmen are appointed by the executive branch.[96] Traditionally, an ombudsman institution does not have an explicit human rights mandate.[97] Rather, an ombudsman takes public complaints, investigates them impartially, makes recommendations, and reports to the legislature (or the executive in cases of executive appointment). The ombudsman is typically empowered to determine whether government administrative conduct is illegal or contrary to broader standards of unfairness, injustice, or wrong behaviour. Ombudsmen are always given strong powers of investigation including the powers of *subpoena*, requiring the production of documents, attendance, and testimony by witnesses.[98] After an impartial investigation is completed, the ombudsman usually determines the case and makes recommendations, often including changes to laws or administrative policies.[99] Some have powers to undertake inspections of government facilities where persons are involuntarily detained, e.g. prisons.[100]

The main objective of the ombudsman is to improve both performance of public administration and government accountability to the public. Classical ombudsmen usually do not have jurisdiction over complaints between private actors.[101] An ombudsman has a duty to make annual reports to the legislature concerning the activities of the office and some can make special reports based on *suo moto* investigations or serious abuses.[102] Also the ombudsman is required to make a report

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[96] E.g. Most ombudsmen in Africa and Asia are executive appointments, see *Ombudsman, supra* note 8 at 218.
[97] Reif, *supra* note 9 at 9.
[98] *Ombudsman, supra* note 8 at 4.
[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.* at 3.
[102] *Ibid.*

of his/her findings to the complainant, the government and, if necessary, the legislature.[103]

D. The Hybrid Human Rights Ombudsman

A hybrid human rights ombudsman (HHRO) is an institution that has dual mandates to protect and promote human rights and to monitor government administration.[104] Almost all HHRO have power to investigate public complaints and have numerous functions defined in terms of protection and promotion of human rights, and improvement of government administration.[105] There are a few HHRO with jurisdiction over complaints against both public and private sectors, e.g. in Tanzania and Ghana. When a hybrid institution does not have the power to hear and determine complaints against the private sector, the office is constituted by a single person, and the office holder is appointed by the legislature, then such an institution more closely resembles the ombudsman model.[106] A HHRO is closer to a human rights commission model when its main role is to provide human rights education and protection, and it undertakes law reform initiatives and provides advice.[107] In some instances, hybrid human rights institutions have powers to refer constitutional cases to constitutional courts and request constitutional review.[108] A few have powers to go to court to enforce their own decisions.[109] In some countries, especially in Africa, HHRO have been established with multiple mandates including "...human rights protection,

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[103] *Ibid.* at 4.
[104] *Ibid.* at 87.
[105] Reif, *supra* note 9 at 11.
[106] *Ibid.*
[107] *Ombudsman*, *supra* note 8 at 87.
[108] *Ibid.* at 88.
[109] *Ibid.*

corruption fighting, enforcing leadership codes, good governance promotion and/or environmental protection...".[110]

The reasons for establishing these institutions are many and diverse. One of the reasons is that fewer financial and human resources are required to run one office rather than two separate institutions.[111] Developing and small countries which have limited resources are more inclined to establish a hybrid institution rather than two separate offices.[112] In some cases, complaints based on human rights violations and/or administrative injustices do overlap and, therefore, there is no need for duplication of institutions.[113]Also, factors such as historical and political ties or a shared cultural or legal heritage play a great role in influencing certain states to establish hybrid institutions.[114]

E. Specialized Institutions

Specialized institutions are bodies established by a government as accountability institutions to protect certain vulnerable groups of people.[115] Specialized institutions protect groups such as ethnic, linguistic and religious minorities, indigenous populations, aliens, refugees, children, women, the poor, and the disabled.[116] Most of these institutions are vested with the power of investigation. They can often investigate matters relating to discrimination against an individual or groups of people. Many of these specialized institutions have no power to issue

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[110] *Ibid.* at 224.
[111] *Ibid.* at 88.
[112] *Ibid.* at 89.
[113] *Ibid.* at 88.
[114] *Ibid.* at 89.
[115] *Ibid.* at 20. See also *Fact Sheet No. 19*, *supra* note 1 at 9.
[116] *Ombudsman*, *supra* note 8 at 83.

binding decisions or initiate legal action.[117] They systematically review and monitor the effectiveness of existing laws and constitutional provisions relating to the group they were created for. Sometimes these institutions provide consultative and advisory services to parliament and the executive.[118]

F. Setting Standards for National Human Rights Institutions

1. Geneva Guidelines

On many occasions since 1946 the UN has held deliberations on standards for establishing NHRIs and programs for promoting such institutions. On December 16, 1977, the UN adopted a resolution in which it encouraged, *inter alia,* the "...[e]stablishment of national or local institutions for the promotion and protection of human rights...".[119] A year later, in 1978, the UN Commission on Human Rights adopted guidelines for the structure and functioning of national institutions.[120] Standard setting in the field of human rights gained momentum during the 1960s and 1970s, and the UN in this period stepped up its deliberations aimed at finding ways for NHRIs to implement international human rights standards effectively.[121] Towards the end of 1978, the UN Commission on Human Rights organized a seminar to deliberate, *inter alia*, draft guidelines for the structure and functions of NHRIs.[122] The Geneva seminar approved a set of guidelines. The first part of the Geneva Guidelines

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[117] *Fact Sheet No.19, supra* note 1 at 10.
[118] *Ibid.*
[119] *UNGA Resolution, Observance of the Thirtieth Anniversary of the Universal Declaration of Human Rights*, A/RES/32/123, December 16 1977, Annex, para. 1(c).
[120] *United Nations Commission on Human Rights, Seminar on National and Local Institutions for the Promotion and Protection of Human Rights. Addendum*, UN Doc. ST/HR/SER.A/2 and Add.1, the meeting was held on November 15, 1978 [*Addendum*].
[121] *Fact Sheet No.19, supra* note 1 at 3. See also *Handbook, supra* note 2 at 4, para. 22.
[122] *Fact Sheet No. 19, ibid.*

outlined the nature of the functions to be performed by NHRIs. The guidelines suggested that NHRIs should be entrusted:

> (a) To act as a source of human rights information for the government and the people;
> (b) To assist in educating public opinion and promoting awareness of and respect for human rights;
> (c) To consider, deliberate upon, and make recommendations regarding any particular state of affairs that may exist nationally and which the government may wish to refer to them;
> (d) To advise on the questions regarding human rights matters referred to them by the government;
> (e) To study and keep under review the status of legislation, judicial decisions and administrative arrangements for the promotion of human rights, and to prepare reports on these matters to the appropriate authorities;
> (f) To perform any other function which the government may wish them to carry out in connection with the duties of the state under those international instruments in the field of human rights to which it is a party.[123]

Reviewing these guidelines, it is clear that the power to investigate public complaints was not included. Failure to include this power was one of the Guidelines' fundamental weaknesses, an omission that flawed the effective functioning of NHRIs, insofar as victims of human rights violations could not file their cases before NHRIs for further investigation or determination.

The second part of the Geneva Guidelines focused on the structure of NHRIs and, as such, they recommended that NHRIs should:

> (g) Reflect in their composition wide cross sections of the nation, thereby bringing all parts of the population into the decision making process in regard to human rights;
> (h) Function regularly and that immediate access to them should be available to any member of the public or any public authority;

[123] See *Addendum*, *supra* note 120. See also *Handbook*, *supra* note 2 at 4, para. 22.

(i) In appropriate cases, have local or regional advisory organs to assist them in discharging their functions.[124]

The Geneva Guidelines were endorsed by the UN General Assembly[125] and the UN Commission on Human Rights.[126] Later, the UN General Assembly urged member states to establish and strengthen NHRIs in their respective countries.[127] Also, it requested the UN Secretary-General to prepare and submit a comprehensive and detailed report on existing NHRIs.[128] In the 1990s, the UN became increasingly interested in the effective performance of NHRIs[129] and it provided significant support for the establishment of NHRIs in different countries.[130] The Geneva Guidelines contributed to establishing the initial structure and functions of these bodies.

2. The Paris Principles

From October 7 to 9, 1991, the UN Commission on Human Rights organized and held a Workshop for national and regional organizations whose focus was the promotion and protection of human rights.[131] The Workshop's agenda included a proposal to review and explore methods of increasing the effectiveness of NHRIs. The Workshop became a significant event in the establishment of a normative structure for NHRIs. The UN Commission on Human Rights endorsed the Paris Principles adopted by the Workshop.[132] At the end of December 1993, the UN General Assembly

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[124] *Handbook, ibid.*
[125] See *National Institutions for the Promotion and Protection of Human Rights*, UNGA. Res., 33/46. A/RES/33/46, 83rd plen. mtg., December 14, 1978.
[126] Official Records of ECOSOC, 1978, Supp. No. 4 E/1978/34, Chap. XXVI, Sect. A.
[127] *National Institutions for the Promotion and Protection of the Human Rights*, UNGA, Res., 34/49. A/RES/34/49 76th plen. mtg., November 23, 1979.
[128] *Paris Principles, supra* note 4.
[129] Abul Hasnat Monjul Kabir, "Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Process and the Prospects" (2001) 2 Asia Pac. H.R. & L. 1 at 11[Kabir].
[130] *Fact Sheet No.19, supra* note 1 at 5. See also *Handbook, supra* note 2 at 4, para. 24.
[131] See *A Report of the International Workshop on Institutions for the Promotion and Protection of Human Rights, held in Paris from October 7-9, 1991*, UN Doc.E/CN.4/1992/43 and Add. 1.
[132] *Paris Principles, supra* note 4.

endorsed the Principles in a formal resolution.[133] The Paris Principles constitute fundamental guidelines which the UN propounds to assist countries in establishing or strengthening NHRIs. They enumerate the prerequisites for both the establishment and strengthening of NHRIs.

The Paris Principles comprise four major sections. Section A contains principles relating to competence and responsibilities, designed to ensure the effective functioning of NHRIs.[134] In this regard, it should be noted that one of the prerequisites for strong and effective functioning of NHRIs is the nature of their legal mandate and accompanying powers. The Paris Principles recommend that NHRIs be given as broad a mandate as possible and that such mandate be clearly entrenched in a constitution or statute.[135] It is also recommended that NHRIs be tasked with responsibilities that include reporting to the government on human rights matters, ensuring harmonization of national laws with international human rights standards, encouraging ratification of international human rights treaties, contributing to a state's reports to UN treaty bodies (committees), co-operating with international, regional and other NHRIs, assisting in human rights education, and publicizing and promoting human rights.[136]

Section B contains principles concerning the composition of NHRIs and guarantees of their independence and pluralism.[137] In order for NHRIs to maintain their autonomy and independence, it is recommended that the composition of these bodies should ensure a pluralist representation of the social strata, that they be civilian in nature, and that civil society must be involved in the promotion and protection of

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[133] *Ibid.*
[134] *Ibid.*, A. Competence and Responsibilities.
[135] *Ibid.*, para. 2.
[136] *Ibid.*, para. 3.
[137] *Ibid.*, B. Composition and Guarantees of Independence and Pluralism.

human rights.[138] It further recommends that NHRIs be adequately funded, so as to ward off any institutional influence through financial control, and that NHRIs should have infrastructures that ensure smooth conduct of their activities.[139]

Section C contains principles that focus on methods of operation.[140] These principles insist that NHRIs should freely consider any complaints from any petitioners provided that such complaints are within the institution's competence.[141] In addition, NHRIs should be given powers to obtain any necessary information and documents for determination of cases falling within the purview of the institution.[142] Section C also insists that NHRIs should be able to cooperate and consult with other bodies responsible for human rights issues. The section also acknowledges the role played by NGOs in enhancing the activities of NHRIs–it suggests that NHRIs should strengthen relations with NGOs which have responsibilities for the promotion and protection of human rights.[143]

Section D comprises principles applicable to NHRIs which have been given quasi-jurisdictional competence (i.e. NHRIs with the power to investigate complaints).[144] The Paris Principles provide that NHRIs should focus on amicable settlement through conciliation, and this can be done through legislated procedures or binding decisions, and if necessary confidentiality should be observed.[145] Further, the Paris Principles emphasize that NHRIs should keep proceedings confidential, inform

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[138] *Paris Principles, supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 1.
[139] *Ibid.*, para. 2.
[140] *Ibid.*, C. Methods of Operation.
[141] *Ibid.*, para. 1.
[142] Ibid., para. 2.
[143] *Ibid.*, para. 7.
[144] *Ibid.*, D. Additional Principles Concerning the Status of Commissions with Quasi-Jurisdictional Competence.
[145] *Ibid.*, para. 1.

petitioners of the available remedies and the means to realize them, refer cases to appropriate authorities, and be able to make recommendations to relevant authorities.[146]

Generally speaking, the Paris Principles provide fundamental criteria for the institutional framework of NHRIs and their position within the framework of public institutions. Normatively, the Paris Principles have been recognized as international minimum standards for the establishment, strengthening, and effective performance of NHRIs.[147] However, it is difficult to make an argument that the Paris Principles are evidence of customary international law because there is insufficient evidence to establish the existence of essential elements which could justify the claim: they have not been followed consistently, even some of the UN treaty bodies which refer to them have done so only recently, and the same principles do not appear in other international instruments.[148]

It should also be noted that the Paris Principles are not flawless.[149] One flaw is that the Paris Principles do not consider the power to investigate to be a mandatory function of NHRIs.[150] Also, Professor Linda Reif points out another limitation of the Paris Principles in noting that "...[t]he Paris Principles are drafted with only the classical human rights commission model in mind, and the Paris Principles do not

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[146] *Paris Principles*, *supra* note 4, D. Additional Principles Concerning the Status of Commissions with Quasi-Jurisdictional Competence, paras. 2-4.
[147] International Council on Human Rights Policy, *Performance and legitimacy: national human rights institutions* (Versoix, Switzerland: International Council on Human Rights Policy, 2000) at 2[*Performance & legitimacy*].
[148] Linda C. Reif, "The Domestic Application of International Human Rights Law in Canada: The Role of Canada's National Human Rights Institutions" (on file with author) at 13. See also Martin Dixon, *Textbook on International Law*, 5th ed. (Oxford: Oxford University Press, 2005) at 28-34.
[149] Reif, *supra* note 9 at 24.
[150] *Paris Principles*, *supra* note 4, D. Additional Principles Concerning the Status of Commission with Quasi-jurisdictional Competence, para.1.

adequately address the structure and role of the ombudsman or, in some respects, even hybrid institutions, in the protection of human rights...".[151] Given the failure of the Paris Principles to address the other types of NHRIs, they do not comprehensively cover all aspects of all NHRIs.

Scholars also have identified other factors that contribute to the effective functioning of NHRIs, and these factors are not addressed in the Paris Principles.[152] Such factors include the personal character of the person(s) appointed to serve in the institution, potential government politicization of the institution, the receptiveness of the government to the activities of the NHRIs, and the credibility of the institution in the eyes of the populace.[153]

Despite the weaknesses pointed out above, however, the international community and a number of regional institutions harbour the expectation that in order for NHRIs to be effective they should implement the Paris Principles at a minimum.[154]

4. Conclusions

The preceding discussion has observed that, first, the existing UN structure for the protection and promotion of human rights has inherent limitations which make it difficult to provide effective redress for individual victims of human rights violations on the international level.[155] Second, NHRIs take different forms but have many similar features. Despite this however, NHRIs have been categorized into four types and there is no single form which can represent all categories. NHRIs act as

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[151] Reif, *supra* note 9 at 24.
[152] *Ombudsman, supra* note 8 at 396.
[153] Reif, *supra* note 10 at 24.See also *Ombudsman, supra* note 8 at 396.
[154] Obiora Chinedu Okofor & Shadrack C.Agbakwa, "On Legalism, Popular Agency and Voices of Suffering: The Nigerian National Human Rights Commission in Context" (2002) 24 Hum. Rts. Q. 662 at 668.
[155] *Fact Sheet No. 19, supra* note 1 at 1.

complementary institutions to the judiciary in the protection and promotion of human rights at the national level. The degree of mandates and powers of NHRIs vary from one institution to another, even within one category of NHRI. Third, the launch of the Paris Principles provided an international normative benchmark against which NHRIs can be measured. On the one hand, the Paris Principles lay down essential standards for the effective functioning of NHRIs while, on the other hand, they are not comprehensive in terms of both the types of NHRIs covered and the essential characteristics of each NHRI.[156] Fourth, the UN is convinced that a NHRI which is independent of executive government control can provide more effective protection and promotion of human rights at the national level.[157] The UN has been active in encouraging the establishment and strengthening of NHRIs, through the setting of international normative guidelines for these bodies and through the provision of technical and financial support to various governments in order to support the establishment and strengthening of NHRIs.

The next chapter discusses the evolution and the nature of NHRIs in Africa. This discussion addresses issues concerning the historical background of the human rights situation in Africa, the African human rights system, the development of NHRIs in Africa, and issues concerning the nature of African NHRIs.

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[156] *Performance & legitimacy*, *supra* note 147 at 2.

[157] *Handbook*, *supra* note 2 at 36, para. 299. Other international organizations and NGOs also take this position.

CHAPTER THREE

THE GENESIS AND DEVELOPMENT OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN AFRICA: AN OVERVIEW

1. Human Rights Background in Africa

An array of traditional African ethnic societies living under various socio-economic and political entities existed in pre-colonial Africa. Some of these communities were large and complex.[158] It is, however, indisputable that some African traditional institutions had elements of democracy and human rights, found in their religions and cultures.[159]

Some of the African communal norms and traditions worked in the manner of human rights principles. In traditional African society, people shared power and wealth.[160] Nevertheless, human rights were also abused during the pre-colonial period.[161] Arguably, in pre-colonial Africa, human rights were as much violated as they were honoured. African ethnicities, to a certain extent, reinforce divisions and enable the fermentation of hatred between tribes.[162] Indeed, certain traditional cultural practices can find no legal support in light of today's human rights standards.[163]

European colonial rule in Africa was marked by massive violations of human rights of African populations.[164] Colonial powers in Africa violated both individual

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[158] El-Obaid Ahmed El-Obaid and Kwadoro Appiagyei Atua, "Human Rights in Africa: A New Perspective on Linking the Past to the Present" (1996) 41 McGill. L.J. 819 at 821 [El-Obaid and Atua].
[159] *Ibid.*
[160] Brendalyn P. Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (London: Praeger, 1995) at 79 [Ambrose].
[161] *Ibid.*
[162] Rhoda Howard, "Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons" (1984) 6 Hum. Rts. Q. 160 at 168.
[163] E.g. some African ethnic groups do practice female genital mutilation. Some African governments have not yet taken any serious measures to halt such a practice.
[164] Philip C. Aka, "The Military, Globalisation and Human Rights in Africa" (2002) 18 N.Y.L. Sch.J. Hum. Rts. 361 at 381 [Aka].

and collective rights.[165] The socio-economic and political legacies left by colonial authorities had enormous negative consequences for human rights in Africa.[166] During the colonial period, Africans were denied the rights to determine and control their own destinies.[167] Colonialism introduced dramatic changes in socio-political and economic conditions in Africa.[168] Lack of self-determination, coupled with the exploitation of natural and human resources, ruined the power of colonized people to ensure effective promotion and protection of human rights.[169] The post World War II era, however, did in one real sense constitute a landmark in the history of the development of human rights in Africa.

In this era, a signal change occurred. In the words of human rights activist Chris Maina Peter, it was at this moment in the colonial period that, finally, the: "...violations of rights of colonized people were seen and treated as a matter of international concern and debated heatedly in international forums...".[170] Indeed, it was in the post World War II period that most of the African states attained their independence from colonial rulers. The granting of independence provided an opportunity for Africans to realize their right to self-determination and gain control of their destinies. For many Africans, attainment of independence created high hopes and expectations that an independent Africa would foster human rights protection and

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[165] *Ibid.*
[166] *Ibid.*
[167] *Ibid.*
[168] El-Obaid & Atua, *supra* note 158 at 822.
[169] Osita C. Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: The Nigerian Institute of International Affairs, 1984) at 3 [Eze].
[170] Chris Peter Maina, *Human Rights in Africa: A Comparative Study of the African Human and Peoples' Rights Charter and the New Tanzanian Bill of Rights* (London: Greenwood Press, 1990) at 7 [Maina].

promotion, matters that had gone wanting during the colonial era.[171] Within the range of expectations that arose at this time, Aka estimates that:

> The first is the renewed hope for improved human rights in Africa that achievement of political independence generated...the achievement of independence in Africa was one of the milestones in the evolution of human rights in Africa.[172]

Disappointingly, the post-colonial period has been marked by violations of human rights, and even by episodes of massive and systematic human rights violations.[173] Since the early 1960s, however, many of the newly independent states and governments in Africa have entrenched their commitments to adhere to the UDHR.[174] As a result, some have created legal provisions for the protection and promotion of human rights.[175] But such measures have been burdened with significant drawbacks and, as a result, human rights in Africa continue to be violated despite the existence of constitutional guarantees.[176]

The independence of new states in Africa had often come about by a rallying of masses, and typically the attainment of independence left the administration and

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[171] George William Mugwanya, "Realizing Universal Human Rights Norm Through Regional Human Rights Mechanisms: Reinvigorating the African System" (1999) 10 Ind. Int'l & Comp.L. Rev. 35 at 39.
[172] Aka, *supra* note 165 at 382.
[173] Nsongurua J. Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late than Never" (2000) 3 Yale Human Rts. & Dev. L.J. 45 at 46 [Udombana].
[174] Joseph Takoungang, "Democracy, Human Rights and Democratization" in John Mukuru Mbaku and Julius Omuzuanvbo Ibonvbere, eds., *The Transition to Democratic Governance in Africa* (London: Praeger, 2003) at 263 [Takoungang].
[175] Some independent states in Africa had entrenched Bills of Rights in their constitutions for the protection and promotion of human rights.
[176] Eze, *supra* note 169 at 34. Here Eze points to the limitations which inhibit legal measures intended to protect human rights in Africa, Eze writes that "...constitutional guarantees of human rights are subject to certain limitations which derive from a) their location in the constitution; b) the manner in which the relevant provisions have been formulated; c) machinery and procedures for determining the constitutionality of legislative or executive action; d) the possibility of legal action and remedy for individuals who have been deprived of their constitutional rights; e) the degree of independence of individuals who have been deriving on human rights issues; and f) changes, often violent, leading to amendment, partial or total suspension of human rights provisions...".

powers of leadership concentrated in the hands of successful mobilizing elites.[177] Issues of human rights protection were set aside in favour of a policy to ensure rapid development for new states.[178] Consequently, human rights issues were kept at bay,[179] and deemed internal affairs,[180] while African leadership became authoritarian and intolerant of opposition or criticism.[181] In this context, where most of the emergent African governments were effectively weak or even lacked legitimacy, military governments emerged[182] and a period of rampant, massive, and grave violations of human rights ensued in Africa.[183] Under these circumstances, even intact democratic governments in Africa became blemished. Some leaders of these countries kept silent, stayed indifferent, and never condemned those fellow African leaders who were responsible for blatant atrocities and massacres, scandalous dehumanization, and fundamental violations of the rights and freedoms of their citizens.[184]

Research into activities within African states indicates that, notwithstanding their having constitutional guarantees of human rights or being signatories to several international and regional instruments, there remains a gap between their leaders' commitment and the actual situation of human rights.[185] Despite massive and systematic violations of basic human rights, the Organization of African Unity (OAU, now replaced by the African Union) neither condemned nor took measures to end the

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[177] Ebow Bondzie Simpson, "A Critique of the African Charter on Human and Peoples' Rights" (1988) 31 How.L.J. 643 at 645 [Simpson].
[178] *Ibid.*
[179] *Ibid.*
[180] Maina, *supra* note 170 at 7.
[181] Simpson, *supra* note 177 at 645.
[182] Shadrack C. Agbakwa, "Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights" (2002) 5 Yale Human Rts & Dev. L.J. 177 at 182.
[183] Ambrose, *supra* note 161 at XV. See also Udombana, *supra* note 173 at 50.
[184] Indeed, the rise of politics of the gun and the governments without legitimacy from the ruled had serious ramifications for human rights in Africa.
[185] Takougang, *supra* note 174 at 263.

blatant atrocities committed by certain African leaders.[186] The OAU's criticism of the human rights records of individual African leaders was taken as interference in the internal affairs of these countries.[187] The principle of non-interference in the internal affairs of member states as enshrined in Article 3 of the OAU Charter has constantly served as a shield for many African leaders from any condemnation and censure, particularly of matters relating to the abuse of human rights (hereinafter OAU Charter).[188] In practice, the establishment of the OAU basically served to maintain solidarity between African governments and heads of state and to preserve the sovereignty and territorial integrity of all member states.[189] Human rights protection and promotion in the region was relegated to a secondary issue.

2. The African Human Rights System

A. The OAU Charter

The OAU's founding Charter neither explicitly provides for human rights protection nor includes it as part of the OAU's mandate. It did, however, urge member states to have "due regard" for human rights as envisaged in the UDHR.[190] The OAU was instead preoccupied with the obligation of ensuring the liberation of Africa from colonial rule and that its people realize and enjoy the principle of self-determination.[191]

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[186] Christof Heynes, ed., *Human Rights Law in Africa: 1997* (The Hague: Kluwer Law International, 1997) at 48 [*Human Rights Law in Africa*].
[187] Simpson, *supra* note 177 at 644.
[188] *The Charter of the Organization of African Unity*, 479 U.N.T.S. 39, adopted May 25, 1963, and entered into force September 13, 1963, Art. 3 [*OAU Charter*].
[189] Rhoda E. Howard, *Human Rights in Commonwealth Africa* (New Jersey: Rowman & Littlefield Publishers, 1986) at 4.
[190] *OAU Charter*, *supra* note 188, Art. 2(1). The preamble to the *OAU Charter* also recognizes the *Universal Declaration of Human Rights* and the *UN Charter* as the foundation for peaceful and positive cooperation between states.
[191] Simpson, *supra* note 177 at 644.

Further, the OAU Charter did not provide for any institution specifically designed to deal with human rights issues within the member states.[192] Although the Charter created specialized commissions, it made no mention of any commission to be vested with the specific power of dealing with human rights issues.[193] It may rightly be contended that the OAU as a regional body was basically concerned with a set of matters that did not include protecting and promoting basic rights and freedoms.[194] However, egregious abuses of human rights by some African leaders in the 1960s and 1970s did foster dissatisfaction with the *status quo*.[195] Not only that but, increasingly, both the international community and some donors began calling on Africa to end the abuse of human rights and establish regional mechanisms for their protection and promotion.

B. The African Charter on Human and Peoples' Rights

The events prescribed in the preceding section culminated in the adoption of the African Charter on Human and Peoples' Rights in 1981, and its entry into force in 1986 (hereinafter African Charter), together with its institutional mechanisms.[196] The African Charter enshrines three generations of rights: civil and political rights, economic, social and cultural rights, and group rights.[197] The African Charter obligates state parties to ensure the promotion and protection of human rights as

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[192] Victor Dinkwa, "The African Charter on Human and Peoples' Rights: Hopes and Fears" in African Law Association, ed., *The African Charter on Human and Peoples' Rights: Development, Context, and Significance* (Marburg: African Law Association, 1991) at 6 [Dinkwa].

[193] *OAU Charter*, *supra* note 188, Art. XX.

[194] Dinkwa, *supra* note 192 at 6.

[195] Notably, some of these African leaders who assumed commanding roles in the quashing of basic rights and freedoms systematically and massively killed, tortured, and unlawfully detained their citizens.

[196] *African Charter on Human and Peoples' Rights*, OAU Doc.CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), adopted June 27, 1981, entered into force October 21, 1986, Art. 30 [*African Charter*].

[197] *Ibid.*, Arts. 2-13 (civil and political rights), Arts. 14-18 (economic, social, and cultural rights), Arts. 19-24 (group rights), and Arts. 27-29 (individuals' duties to the society).

enshrined in the African Charter.[198] Also, the African Charter encourages the establishment and strengthening of NHRIs when it calls for state parties "...to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter...".[199] The African Charter also creates the African Commission on Human and Peoples' Rights (hereinafter African Commission) to serve as the implementing mechanism for the rights enshrined in the Charter.[200] Apart from the African Charter, there are other human rights instruments dealing with specific areas of human rights.[201]

C. The African Commission on Human and Peoples' Rights

The African Commission was created specifically to protect, promote, and interpret human rights provisions enshrined in the African Charter.[202] It examines State reports and reports of Special Rapporteurs, sends on-site missions, organizes conferences, conducts seminars and research in the field of human rights, disseminates human rights information, and is to "...encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments...".[203] It is further tasked with the responsibilities of formulating principles and rules for resolving problems related

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[198] *Ibid.*, Art. 25.
[199] *Ibid.*, Art. 26.
[200] *Ibid.*, Art. 30.
[201] See *African Charter on the Rights and Welfare of the Child*, OAU Doc.CAB/LEG/24.9/49 (1990), entered into force November 29, 1999; *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted in July, 2003, not yet in force, and *Cairo Declaration on Human Rights in Islam*, UN GAOR, World Conference on Human Rights 4th Sess., Agenda item 5, adopted August 5, 1990, UN Doc.A/CONF.157/PC/62/Add.18 (1993).
[202] *Africa Charter, supra* note 196, Art. 45.
[203] *Ibid.*, Art. 45(1)(a).

to human rights and cooperating with international institutions responsible for the promotion and protection of human and peoples' rights.

The African Commission has the power to receive and consider communications from states[204] and other communications from individuals or NGOs which allege any violations of the African Charter provisions.[205] Such communications must, however, satisfy certain conditions as laid down in the African Charter.[206] Also, the African Commission has the discretionary power to conduct investigations into the alleged human rights violations.[207]

However, the African Commission has been criticized on many grounds, including lack of effective enforcement due to the non-binding nature of the African Commission's findings and the Commission's lack of power to act on its own initiative.[208] Another criticism is that the African Commission's findings relating to violations of human rights are subject to the approval of the OAU (now the African Union) heads of state and government.[209]

In spite of its limitations, the African Commission continues to make a contribution to the evolution of human rights in Africa. For instance, it has been active in promoting human rights awareness and education, and in advising governments on the obligations that they are minimally accountable for under the African Charter.[210]

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[204] *Ibid.*, Art. 45.
[205] Only NGOs with observer status with the African Commission have the competence to institute proceedings before it.
[206] *African Charter*, *supra* note 196, Art. 56.
[207] *Ibid.*, Art. 46.
[208] *Human Rights Law in Africa*, *supra* note 186 at 51. See also *African Charter*, *supra* note 196, Art. 59.
[209] Aka, *supra* note 164 at 393.
[210] Rachel Murray & Malcolm Evans, eds., *Documents of the African Commission on Human and Peoples' Rights* (Oxford: Hart Publishing, 2001) at 364.

In fulfilling its function as envisaged in the African Charter, the African Commission encourages the formation of NHRIs. It adopted a five-year plan of action in 1996, to reinvigorate its aim of engendering the creation of NHRIs and to develop a programme to reinforce such institutions.[211] The African Commission continues to recognize the role played by NHRIs and in 1998 it adopted a resolution which grants special observer status to any African NHRI.[212] The African Commission, however, creates criteria for the granting of this "affiliate status" to NHRIs. These institutions are obliged to comply with the Paris Principles and submit a biennial report to the African Commission.[213] Also, the African Commission adopted two resolutions which encourage the formation of NHRIs by member states.[214] Currently, there are seven NHRIs with observer status.[215]

The granting of observer status was surrounded by several issues which hindered some NHRIs in their application or qualification for the status. First, many NHRIs applied for the status but the African Commission was hesitant to grant the status to the NHRIs for fear of misuse of this status by governments; as a result, the granting of observer status was suspended temporarily, but few months later the

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[211] See Plan of Action of the African Commission on Human and Peoples' Rights, 1996-2001, paras. 99-103.

[212] See *Resolution on Granting Observer Status to National Human Rights Institutions in Africa*, adopted at its 24th Ordinary Session October 22 to 31, 1998, in Banjul, the Gambia. See also the African Commission on Human and Peoples' Rights, online: Resolution on Granting Observer Status to National Human Rights Institutions <http://www.nhri.net/pdf/ResAfrNhri.pdf > [*Observer Status*][last visited November 22, 2005].

[213] *Ibid.*

[214] See *Resolution on the African Commission on Human and Peoples' Rights, Twenty-Eighth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity*, June 26, to July 1, 1992, Dakar, Senegal, at para. 2. See also, the *Resolution on the African Commission on Human and Peoples' Rights, Twenty-Ninth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity*, June 28-30, 1993, Cairo, Egypt, para. 2.

[215] Christof Heyns, ed., *Human Rights Law in Africa*, vol.1 (Boston: Martinus Nijhoff Publishers, 2004) at 611 [Heynes]: National Commission for Democracy and Human Rights (Sierra Leone); Committee for Human Rights (Senegal); National Human Rights Commission (Rwanda); National Commission for Human Rights and Fundamental Freedoms (Niger); Human Rights Commission (Malawi); National Commission on Human Rights (Chad); and National Monitoring Body for Human Rights (Algeria).

granting of observer status was restored.[216] Second, it is difficult for some NHRIs to comply with the Paris Principles as required for observer status.[217] Third, the requirement to submit biennial reports to the African Commission "...on its activities in the promotion and protection of the rights enshrined in the Charter..."[218] increases the workload of NHRIs.

In 1999, the African Commission submitted its policy document before the first OAU Ministerial Conference on Human Rights.[219] The policy document was adopted as the Grand Bay Declaration and Plan of Action which encourages cooperation between the African Commission and NHRIs and also calls upon the African Commission to grant affiliate status to NHRIs.[220] The entirety of the African Commission's efforts amounted to an encouraging approach, rather than seeking an in-depth understanding of the dynamics of NHRIs in relation to their autonomy and credibility in Africa.[221]

D. The Constitutive Act of the African Union

The Constitutive Act of the African Union (AU) was adopted in 2000,[222] it upholds many human rights principles,[223] and stipulates that one of the objectives of the AU should be to promote and protect human and peoples' rights as provided in the African Charter and other human rights instruments.[224] In the provisions governing

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[216] Human Rights Watch, *supra* note 10 at 68.
[217] See *Observer Status*, *supra* note 212.
[218] *Ibid.*, para. C.
[219] See *Declaration and Plan of Action adopted by the First OAU Ministerial Conference on Human Rights*, April 12 to 14, 1999, Grand Bay, Mauritius.
[220] *Ibid.*, para. 25.
[221] Human Rights Watch, *supra* note 10 at 68.
[222] *Constitutive Act of the African Union* adopted July 11, 2000, and entered into force May 26, 2001 [*Constitutive Act*].
[223] *Ibid.*, Art. 4.
[224] *Ibid.*, Art.3(h).

the institutions of the AU, however, there are none addressing NHRIs and none of the organs have express mandates for dealing with human rights cases.[225]

Implicitly, the AU may be said to have an indirect relationship with NHRIs in Africa, since the AU is committed to showing "...[r]espect for democratic principles, human rights, the rule of law and good governance...".[226] One may argue that NHRIs are part and parcel of democratic and good governance, which the AU is committed to respect. However, this linkage is strained, or even far-fetched to the extent that such relationship is obscured.

E. The African Court on Human and Peoples' Rights

The Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights was adopted in 1998 (Protocol to the African Charter) and entered into force on January 25, 2004.[227] The Protocol to the African Charter establishes the African Court on Human and Peoples' Rights (the African Court) which has jurisdiction to deal with "...all cases and disputes submitted to it concerning the interpretation and application of the African Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned...".[228] The African Court has powers to receive and determine human rights cases from state parties which have made a declaration accepting the competence of the Court,[229] the African Commission, and intergovernmental organizations.[230] Also, the African Court may receive and determine human rights cases from NGOs (only those with observer

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[225] *Ibid.*, Art. 5.
[226] *Ibid.*, Art. 4.
[227] *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* adopted June 9, 1998, OAU Doc/LEG/EXP/AFCHPR/PRO(III), entered into force January 25, 2004 [*Protocol to the African Charter*].
[228] *Ibid.*, Art. 3.
[229] *Ibid.*, Art. 34(6).
[230] *Ibid.*, Art.5.

status) and individuals after satisfying the conditions under Article 34(6) of the Protocol to the African Charter.[231] Further, the African Court has powers to give advisory opinions at the request of any OAU Member State, the OAU itself or its organs (replaced by the AU), or any African organization recognized by the OAU.[232] The Protocol to the African Charter provides limited access to the African Court by the NHRIs in the sense that there is no explicit provision which permits NHRIs to bring complaints before the Court or seek advisory opinions from the Court; however, NHRIs may be permitted to appear before the Court to represent victims.[233] Further, the states of victims must comply with Article 34(6) and the Court has discretionary powers in admitting complaints.[234]

3. National Human Rights Institutions in Africa: The Beginning

The history of NHRIs in Africa shows that there were a few ombudsman offices established in the 1960s and 1970s.[235] In the 1990s, the winds of change started to blow over Africa, particularly in the areas of good governance and respect for human rights. Many African states started to restructure existing NHRIs.[236] An exponential increase in the establishment of NHRIs in Africa began in the 1990s.[237] In the past two decades, many African governments have become signatories to human rights treaties and so have become bound under international law to implement the obligations contained therein.[238] Thus, the desire grew to establish and strengthen

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[231] *Ibid.*
[232] *Ibid.*, Art. 4.
[233] *Ibid.*, Art. 10.
[234] *Ombudsman*, *supra* note 8 at 217.
[235] Reif, *supra* note 9 at 61.
[236] *Ibid.*
[237] Brocato, *supra* note 14 at 393. See also Reif, *ibid.* at 10.
[238] *Handbook*, *supra* note 2 at 3, para. 16.

democratic NHRIs, so that these in turn could facilitate the implementation of international human rights norms at the national level.[239]

The perception grew among African nations during the 1990s that the establishment and strengthening of NHRIs engendered legitimacy before both the international community and state donors.[240] The first African Conference of NHRIs was held in February 1996.[241] The Conference encouraged African countries to strengthen and create NHRIs and also urged African NHRIs to conform to the Paris Principles.[242] The second African Conference of NHRIs was held in July 1998.[243] The Conference reiterated the importance of creating and developing NHRIs in Africa and also emphasized the importance of African NHRI compliance with the Paris Principles so as to ensure their credibility, integrity, independence, and effectiveness.[244] The third African Conference of NHRIs was held in March 2001.[245] The Conference encouraged the strengthening and creation of NHRIs in Africa. The Conference again underscored the importance of African NHRI conformity with the Paris Principles.[246] The fourth Conference of African NHRIs took place in August 2002.[247] The Conference reiterated that African NHRIs must respect and function in conformity with the Paris Principles.[248] Recently, the AU organized its first

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[239] Claude E. Welch, "The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment" (1992) 14 Hum. Rts. Q. 43 at 49.
[240] Tsekos, *supra* note 64 at 21.
[241] *The Yaounde Declaration* (February 5-7, 1996).
[242] *Ibid.*, para. 1.
[243] *Durban Declaration* (July 1-3, 1998).
[244] *Ibid.*, para. 1.
[245] *Lome Declaration* (March 14-16, 2001).
[246] *Ibid.*, paras. 1-2.
[247] *Kampala Declaration* (August 14- 16, 2002).
[248] *Ibid.*, Preamble.

Conference of NHRIs in October 2004.[249] Among the core objectives of the Conference were the encouragement of the establishment of NHRIs in those African countries which have not yet created such institutions and the devising of strategies to improve the work of existing NHRIs.[250]

Research shows that by early 2005 approximately fifty-eight NHRIs (excluding specialized institutions) had come into existence in Africa. Also, there are approximately 22 HRCs, 10 HHRO, and 23 classical ombudsmen and other hybrid ombudsmen.[251] The increase was motivated by two factors. First, external support from the UN and its bodies encouraged the creation and strengthening of NHRIs.[252] Second, the establishment and strengthening of these bodies reflected a genuine concern for human rights protection and promotion on the part of some African governments.[253] It was a concern that had grown after having witnessed the egregious human rights records mounted by some African governments.

4. The Role of the United Nations in the Support of National Human Rights Institutions

As discussed in Chapter Two, the UN has fostered an interest in establishing NHRIs since its inception.[254] However, in the past two decades the UN has actively increased its efforts to support the establishment and strengthening of NHRIs in

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[249] See National Human Rights Institutions Forum, online: African Union Conference of National Human Rights Institutions, October 18 to 21, 2004 < http://www.nhri.net/news.asp?ID=723 > [last visited November 22, 2005].
[250] *Ibid.*
[251] See Appendices I & II at 172-174.
[252] Ramcharan, *supra* note 31 at 175. See also *Handbook*, *supra* note 2 at 4, para. 20.
[253] Kamal, *supra* note 13 at 733.
[254] *Handbook*, *supra* note 2 at 4, paras. 20-21.

Africa.[255] Its operating assumption is that the creation of NHRIs in Africa will contribute to the promotion and protection of human rights on the continent.[256]

In order to effectively support the establishment and strengthening of NHRIs, the UN created a special program called The Program of Advisory Services and Technical Cooperation in the Field of Human Rights.[257] In support of this program, in 1987, then UN Secretary-General Javier Perez de Cuellar formed a special fund called the Voluntary Fund for establishing and offering technical support to national and regional institutions involved in implementing international human rights standards at the national level.[258] The OHCHR provides advisory services, and technical and financial assistance with the view to supporting actions and programs in the field of human rights,[259] as well as to coordinate the promotion and protection of human rights activities throughout the UN system.[260]

Since 2000, the OHCHR has been actively involved in providing various forms of assistance concerning the establishment and/or strengthening of NHRIs in different countries.[261] Additionally, the UN established a special advisor to the OHCHR whose functions are to provide "...technical advice, and material assistance to governments creating human rights commissions as well as to existing commissions...".[262] Also, the OHCHR provides advisory services, and technical and financial support for other forms of NHRIs at the request of the concerned country.[263]

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[255] Tsekos, *supra* note 64 at 21.
[256] Human Rights Watch, *supra* note 10 at 73.
[257] Tsekos, *supra* note 64 at 21.
[258] *Ibid.*
[259] *OHCHR Resolution*, *supra* note 28, para. 4(d).
[260] *Ibid.*, para. 4(i).
[261] Ramcharan, *supra* note 31 at 175
[262] Human Rights Watch, *supra* note 10 at 73.
[263] *Ibid.* at 6.

In the course of supporting these institutions, the UN has been criticized for extending support to repressive governments whose human rights records are highly questionable.[264] It was inevitable that governments seeking international legitimacy would create NHRIs to serve as mere façades behind which they could hide their unwillingness to change and which would remain silent even amidst shocking and massive human rights abuses.[265]

Like other nations, African nations do receive technical and material support from the UN.[266] With regard to UN support for establishing and strengthening NHRIs in Africa, research conducted by Human Right Watch has noted that:

> In Africa, the special advisor has provided a range of assistance from providing human rights training and detailed advice on proposed legislation, conducting needs assessments and regional interaction.[267]

More generally, the UN assistance includes the provision of normative guidelines,[268] advisory services,[269] technical assistance,[270] funding,[271] training workshops,[272] meetings,[273] conferences,[274] and relevant information.[275]

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[264] Tsekos, *supra* note 64 at 22. See also Human Rights Watch, *supra* note 10 at 77.
[265] Human Rights Watch, *ibid.* at 74.
[266] *Ibid.*
[267] *Ibid.*
[268] *Paris Principles*, *supra* note 4.
[269] See *Report of the UN Secretary General on the National Institutions for the Promotion and Protection of Human Rights*, UNGA, Res., 54/336, A/54/336, September 9, 1999, 54th Sess., item 117(b), paras. 9-10. The Report suggests that the UN extended advisory services to countries including Kenya, Burundi, Ethiopia, Liberia, Mauritius, Rwanda, Nigeria, Malawi, Uganda, South Africa, and Zambia.
[270] See *Report of the UN Secretary General on National Institutions for the Promotion and Protection of Human Rights*, UNGA, Res., A/56/255, August 1, 2001, 56th Sess., item 131(b), paras. 22-24. See also *UN Commission on Human Rights Resolution, Commission on Human Rights*, E/CN.4/RES/2003/76, para. 12.
[271] Tsekos, *supra* note 65 at 21.
[272] See *Report of UN Secretary General*, *supra* note 318, para. 18. See also *Report of the UN Secretary General on National Institutions for the Promotion and Protection of Human Rights*, UNGA, Res., 58/261, A/58/261, August 7, 2003, 58th Sess., item 119(b), para. 22.
[273] *Report of UN Secretary General, supra* note 270, para. 21.
[274] See *Report of the UN Secretary General on Human Rights Questions: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Freedoms*, UNGA, Res., 50/452, A/50/452, September 20, 1995, item 114(b) 50th Sess., para. 30. See also *UN*

Many African governments continue to receive support and benefits from the UN.[276] The UN policy of providing generic and indiscriminate assistance to every country can be criticized on the ground that such assistance is not accompanied by public criticism of those governments whose human rights records are questionable.[277]

There is a comparative advantage in continuing to extend assistance to weak NHRIs. It is argued that some NHRIs are weak because their governments exert pressure on them, and they thereby lose credibility.[278] But it is important to render support to such institutions because, in the long run, given changes in various effectiveness factors they may eventually become active in defending and promoting human rights.[279] Conversely, there are some NHRIs which appear to be mouthpieces in the defense of their repressive governments. The UN should publicly rebuke institutions which, under such circumstances, work deliberately to undermine efforts at promoting and protecting human rights in Africa.[280] Nevertheless, there are not any examples whereby the UN has applied this approach towards weak NHRIs in Africa.

Although the UN has been credited with supporting the establishment of NHRIs in Africa, it has also been criticized for focusing on the normative structure of NHRIs by bolstering their compliance with the Paris Principles and avoiding the basic

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Secretary General, *supra* note 270, para. 38, the Second Regional Conference of African National Human Rights Institutions was held in Durban, South Africa, from June 30, to July 3, 1998.

[275] See *Report of the UN Secretary General on National Institutions for the Promotion and Protection of Human Rights*, UNGA, Res., 58/261, A/58/261, August 7, 2003, 58th Sess., item 119(b), para. 7.

[276] In particular, countries such as Burundi, Cameroon, Chad, Nigeria, Ethiopia, Kenya, Lesotho, Liberia, Sierra Leone, South Africa, Togo, Uganda, Madagascar, Malawi, Mauritius, Niger, and Zambia.

[277] Human Rights Watch, *supra* note 10 at 76.

[278] *Ibid.*

[279] *Ibid.*

[280] *Ibid.*

question of whether a NHRI is really "...the most effective means to promote human rights within a specific political or cultural context...".[281]

Without discounting the criticisms of the weaknesses of UN activities raised above, the fact remains that, through its agencies, the UN has greatly contributed to the evolution and strengthening of NHRIs in Africa.

5. The Role of States and International Organization Donors

In the past few decades, state and international organization donors' policies relating to the provision of loans and technical assistance to developing nations have become tied to the recipient country's apparent good governance and to the credibility of its human rights protection record.[282] To become eligible for support from donors, some African governments have restructured their old NHRIs or established new institutions to clear their negative human rights records and obtain legitimacy in the eyes of foreign donors.[283] Notably, the NHRCs in Zambia and Kenya were summarily established in order for the two states to become eligible for financial aid from donors.[284] Like the UN, donors' strategies to enhance protection and promotion of human rights in part do give priority to the establishment and fortification of NHRIs.[285]

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[281] *Ibid.*

[282] Peter Takirambudde, "Building the Record of Human Rights Violations in Africa: The Functions of Monitoring, Investigation, and Advocacy" in David Barnizer, ed., *Effective Strategies for Protecting Human Rights: Prevention and Intervention, Trade and Education* (Sydney: Ashgate, 2001) at 14, he observes that "...[h]uman rights assessments have become widely used as a yardstick against which the legitimacy of a government seeking to receive assistance is measured...".

[283] Human Rights Watch, *supra* note 10 at 76.

[284] E.g. it is observed that both the Kenyan and Zambian Human Rights Commissions were established shortly before donor meetings to discuss the renewal of aid conditioned on human rights and economic reforms. They both rushed into creating HRCs to reassure donors that they were committed to respecting and promoting human rights, see Human Rights Watch, *ibid.* at 76.

[285] *Ibid.* at 77.

Donors significantly assisted and continue to support many African governments in their efforts to create and strengthen their NHRIs.[286] Funding from donors is readily available to any African government whose intention is either to create or strengthen its NHRI.[287] However, in spite of donors' active provision of funding, the contention is that they rarely follow up to ensure that the funded institutions are operating effectively and that they have secured the confidence of their public.[288]

It is also a sad fact that donors do render assistance to NHRIs regardless of their credibility. In criticizing international donors' policies in Africa, Human Rights Watch observes that "...one finds in Africa, comparatively stronger human rights commissions that are short of funding, and weaker human rights commissions that have received funding..."[289]

Ironically, the tendency of donors actively to support weak and ineffective NHRIs in Africa or to make few attempts to evaluate the effectiveness of these bodies may itself contribute substantially to problems in the development of effective human rights bodies in Africa. By failing to criticize funded bodies or to make their funding contingent on the effectiveness of these institutions, donors effectively legitimize institutions that are not only weak and ineffective but which basically operate by way of defending their abusive governments.[290]

Also, the indiscriminate support of weak NHRIs in Africa fosters the serious misconception and belief that NHRIs "...are not always the most effective

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[286] *Ibid.*
[287] Tsekos, *supra* note 64 at 22.
[288] *Ibid.*
[289] Human Rights Watch, *supra* note 10 at 77.
[290] *Ibid.*

instruments for change...".[291] That the UN takes the same position in not publicly criticizing weak NHRIs in Africa only worsens this situation.[292] It would be better for external funding of a NHRI (from both international organizations and/or state donors) to be made contingent on an increase in its effectiveness in bringing about positive change. Both the international community and donor states should persistently and publicly critique those NHRIs which are ineffective and weak.

Support from donors can inadvertently contribute to the ineffectiveness of NHRIs in Africa in other ways as well. This is true especially when donors provide their support in an *ad hoc* fashion, or when donors tie aid to stringent conditions which reduce the effectiveness of the supported institutions. Sometimes NHRIs urgently need support from donors but, unfortunately, such assistance is not made promptly when donors offer support in an *ad hoc* fashion.

Accordingly, in the process of creating NHRIs, African governments endeavour to ensure that these bodies are in line with the Paris Principles so that they can win legitimacy and gain the full support of donors.[293] But, in reality, some African leaders are not strongly committed to respecting and promoting human rights in their countries. This also is one of the reasons that has led to the existence of weak NHRIs in Africa.

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[291] *Ibid.*
[292] *Ibid.*
[293] Katarina Tomasevki, *Responding to Human Rights Violations: 1946-1999* (The Hague: Martinus Nijhoff Publishers, 2000) at 235. The author argues that African nations whose survival depended on donors' aid were vulnerable to shifts in donors' priorities. A country's human rights record was one of the many grounds upon which donors could decide whether to give aid to African countries.

6. National Human Rights Institutions in Africa with Express Human Rights Mandates

African countries use all four forms of NHRIs. As discussed earlier, they can be classified as the: human rights commission, ombudsman, hybrid human rights ombudsman, or specialized institution.[294] However, the discussion below focuses on two forms of NHRIs in Africa with express human rights mandates: the hybrid human rights ombudsman and the human rights commission.[295]

A. Mode of Establishment

The process of establishing NHRIs in Africa is critical, especially in ensuring their legal independence and distance from government interference. In this regard, the Paris Principles recommend that an NHRI be explicitly entrenched in a country's constitution and/or in statute.[296] In addition, the founding law should stipulate clearly the institution responsible for creating the NHRI as well as the method of appointing NHRI members, the duration of their tenure, the conditions for removal of incumbents, and the body responsible for terminating the service of the members. It is further recommended that privileges and immunities for members be provided in the statute.[297] All these are significant issues, especially in ensuring the independence and autonomy of the institution.

As noted earlier, some state donors and international organizations emphasize that both new and established NHRIs should comply with the Paris Principles, and sometimes they make their financial and technical support conditional on this

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[294] *Ombudsman, supra* note 9 at 215.
[295] It should be noted that specialized institutions with human rights mandates will not be addressed.
[296] *Paris Principles, supra* note 4, A. Competence and Responsibilities, para. 2.
[297] *Handbook, supra* note 2 at 11, paras. 78-81.

requirement.[298] Accordingly, to garner legitimacy and obtain support from donors and international organizations, legal provisions for a majority of Africa's NHRIs are enshrined in their country's constitution, followed by a more detailed statute. The act of entrenching a NHRI in a country's constitution establishes a strong legal foundation for such an institution.

Research indicates that 19 out of 32 African HRCs and HHRO (59%) were established in their countries' constitution and further supported by enabling legislation.[299] This study further indicates that 4 out of these 32 (13%) were created in statutory texts only, while 9 out of these 32 (28%) were created by executive decrees.[300]

NHRIs which have been created through executive decrees have a weaker legal foundation compared to those supported by constitutional provisions. The 28% of HRCs and HHRO surveyed which are formed through mere executive decrees are at risk of losing their independence should the executive ban or circumscribe their operations by counter-decree. One scholar concludes that those NHRIs established through executive decrees are the weakest institutions in Africa.[301]

The Paris Principles provide that the power of appointment of NHRI members should be entrusted to a representative body, i.e. the legislature.[302] In particular, it has been clearly noted that the appointment of NHRI members in Africa is determined by the executive branch in most countries regardless of whether the NHRI has been

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[298] See Alex De Waal, "Human Rights in Africa: Values, Institutions, Opportunities" in Kamal, *supra* note 14 at 772.
[299] See Appendix. I at 171.
[300] *Ibid.*
[301] Heynes, *supra* note 215 at 851.
[302] *Handbook*, *supra* note 2 at 11, para. 79.

established by constitution or statute.[303] For instance, research indicates that the executive branch was directly involved in the appointment of members in 27 out of 32 (84%) HRCs and HHRO in Africa.[304] However, some members who were selected via presidential appointment nevertheless retain their independence and autonomy.[305] Understandably, the issues of independence and autonomy of NHRIs do not necessarily and solely depend upon the nature of appointment, because there are other influential determinants.

There are three reasons underlying the preference given to the executive appointment of members. First, in some jurisdictions, NHRIs are considered politically sensitive bodies given the nature of their investigations. Accordingly, some government leaders inevitably choose to retain some powers of control over the appointment process and investigations.[306] Second, historically, in some countries parliamentary supremacy and the influence exercised by the legislature are questionable, to such an extent that it becomes inappropriate even to entrust the power of appointment of NHRIs to their national legislative bodies.[307] As Maluwa explains, African nations adopted "...the notion of constitutional supremacy and, correspondingly, abandoned the doctrine of parliamentary sovereignty...".[308] The significance of this approach is that it elevated weak legislatures in Africa which made way for the emergence of military and authoritarian regimes. Historically, political institutions such as parliament are the product of colonial administration

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[303] *Manual*, *supra* note 55 at 16; Carver and Hunt, *supra* note 13 at 752.
[304] See Appendix I at 171.
[305] Human Rights Watch, *supra* note 10 at 30.
[306] *Manual*, *supra* note 55 at 17. See also Carver & Hunt, *supra* note 13 at 753.
[307] Carver & Hunt, *ibid.*
[308] Tiyanjamna Maluwa, *International Law in Post-Colonial Africa* (London: Kluwer Law International, 1999) at 121.

bequeathed to Africa by the colonial powers, and the newly independent nations of Africa adopted these institutions without improving on their institutional capacities. Third, it is argued that were the establishment of NHRIs to occur without the full support of heads of state or government, it would doom such bodies to failure because they would never obtain the necessary cooperation from the government of the day.[309]

These reasons gained their validity from a context in which dictatorships and authoritarian regimes predominated in Africa.[310] Today, in the face of the current and widespread democratization process which is sweeping across the whole continent, it is difficult to maintain such reasons as justification for executive involvement in the appointment of NHRI members. The process of democratization demands the establishment and strengthening of democratic institutions practicing good governance.

These changes should inevitably result in African leaders surrendering their control over NHRIs. Ultimately, it is the power of people at the grassroots level that determines the existence and operation of government institutions. This is one part of Ambrose's argument when he submits that:

> The present attempt at democratization and protection of human rights in Africa will continue to be frustrated unless the struggle is waged by the oppressed people themselves. They must be organized at the grassroots level and be able to express their collective concerns effectively.[311]

Thus, the tendency of the executive branch to exert control over the appointment of NHRI members can no longer be interpreted as an endeavour to strengthen NHRI operations but rather as a means to impede their freedom and autonomy. There are a

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[309] *Manual*, *supra* note 55 at 17.
[310] Takougang, *supra* note 174 at 266.
[311] Ambrose, *supra* note 160 at XVII.

few NHRIs in Africa whose members are directly appointed by legislatures, e.g. in Ethiopia and Togo, which provide positive examples.

The composition of NHRIs is another significant issue that determines their independence and effective performance. The Paris Principles advocate for multi-member and diverse institutions in which members are selected from various backgrounds.[312] Some have argued that experience in human rights should be one of the qualifications for potential candidates, but this requirement has not proved to be an essential condition for securing a dynamic institution.

The levels of qualifications of members of NHRIs in Africa vary from country to country. Some members are chosen from "...a wide variety of professional backgrounds, including legal practice, academia, and civil service work, among others...".[313] Nevertheless, the majority of members of NHRIs in Africa at the time of their appointment either had little or no knowledge of human rights issues, including international human rights standards or the basic activities of NHRIs.[314]

B. The Mandate of National Human Rights Institutions

The mandate of a NHRI is supposed to be embedded in a legal text,[315] and research indicates that this is the case in Africa.[316] It appears that the majority of HHRO and HRCs studied have explicit mandates to protect and promote human rights; however, the breadth and nature of this mandate varies from institution to institution.[317] Research shows that HHRO and HRCs studied define their mandates in

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[312] *Paris Principles*, *supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 1.
[313] Human Rights Watch, *supra* note 10 at 18.
[314] *Ibid.*
[315] *Paris Principles*, *supra* note 4, A. Competence and Responsibilities, para. 2.
[316] See Appendix. I at 171.
[316] *Ibid.*
[317] *Ibid.*

a variety of ways. For instance, most HHRO and HRC mandates focus on human rights as defined in a country's constitution, legislation, international human rights treaties to which the country is a party, and/or as defined by customary international human rights law.[318]

The mandates of most HRCs studied are defined in terms of protection and promotion of human rights. Some of the HRC mandates are restricted to either promotional or advisory roles.[319] Others have mandates to review legislation and administrative policies in a country, assist in drafting legislation, monitor compliance with human rights standards, conduct inquiries, visit prison cells, and initiate investigations.[320]

It is noted that most HHRO in Africa have jurisdiction over the public sector only,[321] while others have additional mandates over "... corruption fighting, enforcing leadership codes, good governance promotion and/or environmental protection...".[322]

In countries where two offices (ombudsman and HRC) exist, their mandates are divided. The mandates of the ombudsman usually concentrates on the investigation of maladministration and injustices in the public administration, and the majority of HRC mandates focus on human rights protection and promotion, and investigations cover both the public and private sectors.[323] Where a single office exists in a state, it is often a HHRO with jurisdiction over human rights,

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[318] E.g. Tanzania, Ghana, Kenya, South Africa, Uganda, and Nigeria.
[319] E.g. Algeria, Cape Verde, Morocco, Niger, and Tunisia.
[320] E.g. Tanzania, Ghana, South Africa, Kenya, Uganda, Namibia, Malawi, Ethiopia, Zambia, and Togo.
[321] E.g. Lesotho, Namibia, Malawi, and Uganda.
[322] *Ombudsman*, *supra* note 8 at 224.
[323] E.g., South Africa, Uganda, Malawi, Botswana, Cameroon, Chad, and Mauritius. However, there is a different case in Ethiopia where both the HRC and HHRO deal with human rights cases.

maladministration and injustices, and deals with cases from both the public and private sectors.[324] Sometimes the distinction between jurisdiction over human rights and that of maladministration is blurred, depending on the breadth of the mandate given to a NHRI and the nature of complaints brought before it.[325]

While the Paris Principles consider that the power to investigate human rights complaints is not a mandatory function, many HRCs and HHRO are given the power to investigate public complaints of human rights abuses. Research indicates that the majority of HRCs and HHRO in Africa are vested with the powers to receive and investigate complaints received from victims of human rights violations.[326] Only a few HRCs do not have powers of investigation and are limited to promotional or advisory roles.[327]

Research indicates that 16 out of 32 (50%) of the HHRO and HRCs in Africa place emphasis on the use of amicable means in resolving complaints.[328] It is also shown that 12 out of 32 (38%) of HHRO have the power of referrals.[329] Research also shows that 17 out of 32 (53%) HHRO and HRCs have power to obtain any information and documents necessary for determining complaints.[330] Also, 27 out of the 32 (or 84%) have the powers to make recommendations to relevant authorities,[331] and 12 out of the 32 (38%) have powers to bring an action before a court of law.[332]

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[324] E.g., Tanzania and Ghana.
[325] E.g.,Uganda, and Namibia.
[326] See Appendix III at 174-175.
[327] *Ibid.* E.g., Chad, Morocco, Niger, Senegal, Tunisia, and Cape Verde.
[328] *Ibid.*
[329] Appendix III at 174-175.
[330] *Ibid.*
[331] *Ibid.*
[332] *Ibid.*

Some have powers which are ordinarily exercised by courts of law.[333] Almost every HRC and HHRO studied has some form of power to prepare and publish reports. Although a few of them cannot publish their reports, they have the power to prepare their reports and present them to the head of the executive branch.

While it is observed that many HRCs and HHRO in Africa have powers of investigation, these powers are attached with clogs which limit significantly the effectiveness of investigations.[334] In Mauritius, for instance, certain information and documents relating to Cabinet proceedings and government officials cannot be investigated.[335] In some countries, the head of state has the power to halt investigations in certain areas.[336] Some HHRO and HRCs in Africa have no power to investigate complaints unless available domestic remedies have been exhausted,[337] while others have no power to investigate any complaint unless it has been lodged within a prescribed time period.[338] Some HHRO and HRCs cannot investigate any complaint unless it has passed the required admissibility standards.[339] Some HHRO and HRCs cannot investigate cases pending before any other authorities.[340]

In addressing the methods of operation of a NHRI, the Paris Principles call for those bodies which have investigatory powers to be granted the powers to investigate any type of human rights violations that fall within their jurisdictions.[341] As such the Paris Principles do not entertain unnecessary limitations of powers of these

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[333] *Ibid.*
[334] *Ibid.* See also Carver & Hunt, *supra* note 13 at 738.
[335] *Constitution of Mauritius*, 1968, c. IX, ss. 97(2) and 99(4).
[336] *Ibid.* E.g. Uganda.
[337] E.g. Malawi and Ghana.
[338] E.g. Mauritius, Uganda, and Zambia.
[339] E.g. Tanzania and Togo.
[340] E.g. Ethiopia, Tanzania, and Kenya.
[341] *Paris Principle*, *supra* note 4, C. Methods of Operation, para. 1.

institutions but, rather, encourage countries to give wider mandates to enable them to function effectively.[342] Importantly, the powers of investigation of a NHRI should not exclude major players in the areas of human rights such as security forces, police, and military forces.[343] John Hatchard has registered his concern about the legislated exclusion of certain public officials from the mandate of NHRIs.[344] Yusuf contends that experience shows that NHRIs consistently receive complaints involving members of security forces and, therefore, NHRIs should have jurisdiction over such forces.[345] As a result, the Paris Principles should be more explicit and call for NHRIs to have jurisdiction over all government sectors with no exclusions.

C. Funding of National Human Rights Institutions

The funding of NHRIs is very critical as under-funding negatively affects their effective performance. The Paris Principles state that adequate funding should be provided to a NHRI to facilitate its activities such as running the office and hiring a sufficient number of staff. Also, the Paris Principles underscore that adequate funding helps NHRIs "...to be independent of the government and not be subject to financial control which might affect this independence...".[346] Furthermore, the UN emphasizes financial autonomy[347] and requires NHRIs to have their own budgets independent from other ministerial budgets.[348] NHRIs should exercise control over their own funds to the extent that no external body negatively affects their operations. Research shows

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[342] *Ibid.*
[343] See A.A. Yusuf, "Reflections on the Fragility of State Institutions in Africa" (1994) 2 African Yearbook of International Law 3 at 6.
[344] John Hatchard, "Developing Appropriate Institutions to Meet the Challenges of the New Millennium" (2000) 8 Asia Pac.L. Rev. 27 at 45.
[345] Yusuf, *supra* note 343 at 42.
[346] *Paris Principles*, *supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 2.
[347] *Handbook*, *supra* note 2 at 11, para. 73.
[348] *Ibid.*, para. 75.

that for the majority of HRCs and HHRO in Africa the main source of funding is their legislatures which channel the NHRI's funds through the responsible ministry, and then it is the ministry's responsibility to allocate funds to the NHRI.[349] While this practice is common to many governments in the world, in Africa the practice has a negative impact on the adequacy of funds for and independence of NHRIs.

In Africa, most NHRIs are ill-funded with negative consequences for these institutions, which ultimately deny them viable means for the promotion and protection of human rights.[350]

The inadequate funding of NHRIs in Africa is caused by a variety of factors. The basic reason is the rampant poverty that faces most African states. As a result, most states are unable to extend sufficient resources to their NHRIs. Some African governments are burdened by both internal and external debts and they concentrate on repaying their external debts in order to qualify for further financial aid from donors.[351] Others are burdened with the implementation of structural adjustment programs at the insistence of international financial institutions which at times place emphasis on cutting government expenditures.[352] Some NHRIs in Africa suffer from inadequate funding simply because the executive branch has withheld state funds, using this as a direct means to extend state control over these bodies.[353] For instance, in Cameroon funds were reduced for about two years following the earlier public disclosure and criticism of that government's abuses by the Commission.[354]

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[349] See Appendix I at 171.
[350] *Ibid.*
[351] Human Rights Watch, *supra* note 10 at 21.
[352] *Ibid.*
[353] *Ibid.*
[354] *Ibid.*, at 81.

Securing adequate funds from both internal and external sources is a constant problem for most of the NHRIs in Africa. Of these observed impediments, external sources of funding (i.e. from international organizations and foreign state donors) exist largely as a supplement. In practice, being dependent on external support inhibits the activities of NHRIs to a very great extent. In the face of this, governments should play the main role in providing sufficient funding to enable the effective functioning of NHRIs in Africa. Further, NHRIs should be given a mandate to design and control their own budgets, accountable to and authorized by their legislature.[355] Secondly, NHRIs should strive to avoid being influenced by the executive through budgetary control to enable them to retain their independence and autonomy.

D. Accountability of National Human Rights Institutions

The issue of formal accountability of NHRIs is also critical because it is closely linked to the independence of NHRIs. Guaranteeing the independence of these institutions partly depends on how they are held accountable for what they do. Accountability further connects to such issues as appointment of the NHRI members, reporting of financial accounts, and adoption of regular reporting procedures.[356] Accountability of NHRIs helps to avoid unnecessary overlap with or interferences from other government institutions, and it also helps to preserve their credibility and secure public confidence.[357]

The UN emphasizes that a NHRI's accountability may be entrusted to a representative body such as the legislature or the government.[358] It further insists that

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[355] *Performance & legitimacy, supra* note 147 at 115.
[356] *Ibid.* at 70.
[357] *Ibid.*
[358] *Handbook, supra* note 2 at 17 para. 137.

matters relating to the accountability of NHRIs be enshrined in the founding legislation.[359] In addition, the UN suggests that all NHRIs be held publicly accountable, and this can be done through publication of their reports and by allowing public scrutiny and comments.[360] Also, accountability can be achieved by way of encouraging public debate and evaluation of their activities.[361] The Paris Principles do not state that NHRIs should be accountable to a single government institution. Rather they call for NHRIs to be accountable to the government, legislature, or any other appropriate body.[362] Making NHRIs accountable to the legislature is the desirable choice. Suggesting that NHRIs be accountable to the executive is not an effective approach, especially if the executive is not democratic.

The record in Africa indicates that most NHRIs have been and continue to be accountable to the executive head of state or government.[363] Consequently, the legislature and general public are excluded from scrutinizing the findings of NHRIs and from commenting on their reports. As a result, the credibility and integrity of NHRIs are damaged.

In the past, some scholars reasoned that "...the experience of human rights bodies accountable to the legislature has not so far been a positive one in Africa...".[364] There is, however, hope that in the long run NHRIs in Africa will be fully accountable to their legislature particularly with the increase in multiparty democracies and elected parliaments in Africa.[365] This will be possible if the legal structures governing NHRIs

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[359] *Ibid.*
[360] *Ibid.*, para. 138.
[361] *Ibid.*
[362] *Paris Principles*, *supra* note 4, A. Competence and Responsibilities, para. 3(a).
[363] Carver & Hunt, *supra* note 13 at 739.
[364] *Ibid.* at 753.
[365] *Ibid.*

in Africa provide for such legislative oversight and there is an increased commitment to the human rights cause among legislators.

E. Effects of Decisions of National Human Rights Institutions

Generally, NHRIs issue recommendations which can be directed to government bodies, private organizations, or individuals.[366] These recommendations are usually non-binding on the parties to the case.[367] The recommendations may contain certain proposals which are intended to rectify, prevent, or mitigate the seriousness of the human rights violation. The proposals may include a change of policy or law, procedures, reversal of a decision, or require reconsideration of a previous decision. In some situations, recommendations may call on a party to apologize or pay damages.[368] In Africa, recommendations of NHRIs do not have binding effect, and the majority of NHRIs have no alternative recourse in instances where their recommendations are ignored. However, recently, in some jurisdictions the law has been changed so that recommendations made by NHRIs can become legally binding on the parties involved through further action. This happens especially when there is evidence that certain prior recommendations have not been complied with by the parties.[369] For instance, the HRCs and HHRO in Tanzania, Ghana, Uganda, Kenya, and Benin have mechanisms for enforcing their recommendations which have been ignored.[370]

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[366] *Handbook*, *supra* note 2 at 33, para. 271.
[367] *Ibid.*, para. 272.
[368] *Ibid.*, para. 271.
[369] *Ibid.*
[370] See *Tanzania Commission for Commission and Good Governance Act*, No.7, 2001, s. 28(3) (Tanzania) See also Parliament of Tanzania, online: Acts of Parliament <http://www.parliament.go.tz/Polis/PAMS/Docs/7-2001.pdf> [last visited November 22, 2005] [*Commission Act*]; *the Commission on Human Rights and Administrative Justice Act*, 1993, No. 456 of 1993, Art. 18(2) (Ghana)[*Administrative Justice Act*]; *Uganda Human Rights Commission Act, 1997*, No.4

In Ghana, the Commission on Human Rights and Administrative Justice has the power to refer its recommendations to any court of law for the court to enforce it.[371] In Kenya, recommendations of the Kenya Commission on Human Rights can be enforced like an order of the High Court.[372] Further, the law provides that the party in whom the decision is in favour of has the right to apply to the High Court to enforce the Commission's recommendations.[373] The Uganda Human Right Commission has powers of a court to issue orders, and if any party to a case is not satisfied with the order of the Commission such a party has a right to appeal to the High Court.[374]

In order for HRCs and HHRO in Africa to make meaningful contributions toward human rights promotion and protection, there is a need to increase their powers, especially in the area of enforcing recommendations. They should be empowered to make referrals to court in the event of non-compliance with their recommendations and the courts should be given corresponding powers to enforce those recommendations. Alternatively, HRCs and HHRO should be given the power to refer a case to a special tribunal or body responsible for human rights cases.[375] This is a procedure used by HRCs in other countries such as Canada.[376]

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of 1997, s. 8(2) (Uganda)[*Uganda Commission Act*] where the law provides that "...decisions of the Commission ...shall have the same effect as those of a court and shall be enforced in this manner..."; *The Beninoise Commission on Human Rights Act*, 1989, No.89 of 1989, Art. 12, (Benin); and *Kenya National Commission on Human Rights Act*, 2000, s. 19 (Kenya)[*Kenya Commission Act*].

[371] *Administrative Justice Act, ibid.*, Art. 18(2).

[372] *Kenya Commission Act, supra* note 370, s. 19(5).

[373] *Ibid.*

[374] *Constitution of the Republic of Uganda*, 1995, Art. 53(3) [*Constitution of Uganda*]; and *Uganda Commission Act, supra* note 370, 1997, s. 22(1)

[375] Kamal, *supra* note 13 at 456.

[376] *Canadian Human Rights Act*, R.S. 1985, c.H-6, s. 49 (1) [*Canadian Commission Act*].

F. The Role of Non-Legal Factors on the Effectiveness of National Human Rights Institutions

This research recognizes that the effectiveness of NHRIs in Africa is determined by a combination of legal and non-legal factors. Non-legal factors have the ability to influence the effectiveness of NHRIs in a variety of ways, including: the nature and reaction of governments to the NHRI, the relations of the NHRI with mass media, relations of the NHRI with human rights NGOs and related civil society organizations, the character of NHRI incumbents, and the accessibility and public perception of the institution.

1. Nature and Reaction of Government

The effective of a NHRI is determined by the character of the government of the day and its attitude towards the NHRI's operations. This includes the existence of functioning democratic system in a country and government commitment and willingness to render support for the work of NHRIs. The degree of democratic governance of a country has a significant influence on the effectiveness of NHRIs. For example, it is very difficult for NHRIs to operate effectively in a context "...without a democratic system of checks on the exercise of power, where real independence from the ruling power is not possible and where human rights are not respected in law and/or practice...".[377] There is skepticism about the effectiveness of NHRIs in Africa, especially in those countries that have newly established NHRIs, but which are at the same time opposed to the democratization process and continue to exercise

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[377] *Reif, supra* note 9 at 24. See also Maria O'Sullian, " National Human Rights Institutions: Effectively Protecting Human Rights?" (2000) 25 Alternative Law Journal 236 at 237. See also Roy Gregory," Building an Ombudsman Scheme: Statutory Provisions and Operating Practices" in Linda C. Reif, ed., *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (The Hague: Kluwer Law International, 1999) at 157 [*Anthology*].

authoritarian rule in their countries.[378] Therefore, engendering the effectiveness of a NHRI presupposes the existence of basic democratic values and structures in the state.

The establishment of NHRIs in Africa especially in those countries without a minimum level of democratic governance has produced negative results in the operations of NHRIs. For example, some countries in Africa abolished their NHRIs.[379] In other states NHRIs which have been actively engaged in strengthening a culture of respect for human rights have come under threat. For example, Uganda's Cabinet proposed to abolish the Ugandan Human Rights Commission in 2003.[380]

Also, government attitudes and responses towards NHRI operations are significantly important in maximizing the effectiveness of NHRIs. The UN notes that one of the effects of lack of government political will on the NHRI's work is government failure to act expeditiously and/or acknowledge NHRI recommendations.[381] In order to enhance the effectiveness of NHRIs, the government of the day must provide effective support to NHRI work and act on NHRI recommendations expeditiously.[382] While commenting on the vulnerability of NHRIs in Africa due to lack of political will on the part of governments, Apollo Makubuya states that:

> National human rights institutions are vulnerable to executive and bureaucratic manipulations and that their work in promoting and protecting human rights can only be

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[378] Kamal, *supra* note 13 at 31.

[379] National Human Rights Institutions were abolished in Sudan and Swaziland.

[380] Apollo N. Makubuya, "National Human Rights Institutions Under Fire: The Ugandan Human Rights Commission on the Blink" (2004) 10 East African Journal of Peace and Human Rights 78 at 78 [Makubuya].

[381] *Handbook*, *supra* note 2 at 25, para. 198. See also John Akokpari, "Contemporary Governance and Development Issues in Lesotho: Implications for the Ombudsman Office" in Victor Ayeni, ed., *The Ombudsman and Good Governance in the Kingdom of Lesotho* (London: Commonwealth Secretariat, 2000) at 30.

[382] Reif, *supra* note 9 at 27. See also Human Rights Watch, *supra* note 10 at 85.

> possible if the respective governments have the political will to respect the institutions' autonomy, thus enhancing their credibility and effectiveness.[383]

Some African governments have lacked the political will to implement NHRI recommendations or claims awarded to victims of human rights violations. For example, the Uganda government has "...failed and/or refused to pay compensation to over 23 claims for torture victims since January 2001...".[384] Any government refusal or delay in acting on the NHRI recommendations harms the effectiveness of the NHRI. Therefore, the political will of government and its response to NHRI work are critical in engendering the effectiveness of NHRIs.

2. Relations with Mass Media

The media has the ability to shape public opinion on issues of public concern and increase public awareness of the existence and operations of NHRIs. The media also is a powerful instrument for mass education.[385] Underscoring the role of mass media in enhancing the effectiveness of NHRIs, it is observed that:

> National human rights institutions should pay particular attention to their work with the mass media which are important both for educating the public about human rights issues and for exposing public institutions and officials that have committed human rights violations thereby contributing to the effectiveness of the national human rights institutions.[386]

The effectiveness of some African NHRIs has in part resulted from a close relationship with the media. For example, the NHRIs in Ghana and South Africa use the media to publicize their existence and, operations, and provide human rights

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[383] Makubuya, *supra* note 380 at 96.
[384] *Ibid.* at 86.
[385] *Anthology, supra* note 377 at 711. See also *Handbook, supra* note 2 at 19, para. 156.
[386] *Performance & legitimacy, supra* note 147 at 111.

education.[387] The NHRIs in Ghana and South Africa are among the most promising NHRIs in Africa.

3. Relations with Human Rights NGOs and Related Civil Society Organizations

It is important for NHRIs to establish good relationships with human rights NGOs and civil society groups in order to maximize their effectiveness. These institutions can play various roles to increase the effectiveness of NHRIs, such as assisting victims of human rights abuses to bring cases before NHRIs, raising awareness of the existence and functions of NHRIs, providing necessary resources and information to NHRIs, and rendering necessary expertise for NHRI operations.[388]

The Paris Principles recognize the role of human rights NGOs and other similar civil society organizations in maximizing the operations of NHRIs. They emphasize that NHRIs should develop strong relations with human rights NGOs and related civil society groups.[389] Some scholars also emphasize that NHRIs should work closely with human rights NGOs and related civil society establishments.[390]

Considering the fact that most people in Africa live in rural areas and "...the majority of the population in most African countries still suffer from ignorance of their legal rights and remain susceptible to governmental abuses of power...",[391] most human rights NGOs and other civil society groups have the resources necessary to

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[387] *Ibid.* at 95.
[388] *Manual, supra* note 55. See also *Performance & legitimacy, supra* note 147 at 109.
[389] *Paris Principles, supra* note 4, C. Method of Operations, paras. F and G. See also *Reif, supra* note 9 at 26. See also Human Rights Watch, *supra* note 10 at 86.
[390] Kabir, *supra* note 129 at 46. See also C. Raj Kumar, "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights" (2003) 19 Am. U. Int'l L. Rev. 259 at 297. See also John Hatchard "A New Breed of Institution: The Development of Human Rights Commissions in Commonwealth Africa with Particular Reference to the Ugandan Human Rights Commission" (1999) 32 Com. & Int'l L.J.S. Afr. 28 at 52.
[391] John Hatchard, "The Ombudsman in Africa Revisited" (1991) 40 I.C.L.Q. 937 at 942.

reach out to the rural grassroots populations.[392] Therefore, developing strong relations between NHRIs and human rights NGOs and civil society enables NHRIs to improve their accessibility to larger segments of the populace.

4. Character of Incumbents of National Human Rights Institutions

The personal character of the incumbents of NHRIs plays a significant role in determining the effectiveness of NHRIs. There are many ways in which the personal qualities of incumbents influence the operations of NHRIs. For example, individuals who are appointed to work in NHRIs may have different attitudes to addressing pressing and sensitive human rights issues, and they may broadly or narrowly interpret their legal mandates.[393] Professor Linda Reif argues that:

> It is extremely important to appoint an individual or individuals to head a national human rights institution who have expertise, integrity, and credibility in the eyes of both the government and the populace. The strength of character and, occasionally, the courage needed to operate an effective national human rights institution should not underestimated.[394]

Likewise, in Africa the personal qualities of persons appointed to serve in NHRIs have a significant impact on the effective functioning of NHRIs.[395]

5. Accessibility and Public Perception of the Institution

NHRIs should be accessible to the widest possible number of people they are intended to serve. The UN identifies three ways in which a NHRI can be accessible:

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[392] *Performance & legitimacy, supra* note 147 at 109.
[393] A. Ruzindana, "The Role of the Ombudsman in Enforcing Accountability" in Linda C. Reif, ed., *The International Ombudsman Yearbook* (The Hague: Kluwer Law International, 1999) at 186. See also *Anthology, supra* note 377 at 147.
[394] *Reif, supra* note 9 at 27.
[395] Human Rights Watch, *supra* note 10 at 17.

through public awareness of the institution, through the operations of the NHRI in people's localities, and through representative composition.[396]

Due to lack of adequate resources, the majority of the operations of NHRIs in Africa are urban-centred. The majority of the population in remote rural areas has less access to a NHRI's services and, therefore, the effectiveness of a NHRI in addressing human rights issues is significantly hampered by non-accessibility of its services. Some NHRIs in Africa have tried to decentralize their operations in various regions so that they can be accessible to a larger population. For example, the Commission on Human Rights and Administrative Justice in Ghana has 10 regional offices and 39 district offices.[397] The SAHRC has 7 provincial offices and one head office in Johannesburg.[398] The Uganda Human Rights Commission has 6 regional offices and one head office in Kampala.[399]

The public perception of the institution is equally important in engendering the effectiveness of NHRIs. NHRIs should not be politicized.[400] Such NHRIs are likely to lose credibility in the eyes of the public. NHRIs can enhance their effectiveness provided that the public understands:

> that the institution can provide it with real benefits: through its right to complain about poor administration or human rights breaches, to obtain an impartial investigation of the matter, and to have some positive results if wrong doing is found. [401]

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[396] *Handbook, supra* note 2 at 13-14, paras. 27-28.
[397] Kamal, *supra* note 13 at 190.
[398] South Africa Human Rights Commission, online: contact details, <http://www.sahc.org.za/sahrc_cmc/publish/cat_index_19.shtml> [last visited November 22, 2005].
[399] Uganda Human Rights Commission, online: regional offices, < http://www.uhrc.org/regional.php> [last visited November 22, 2005].
[400] Reif, *supra* note 9 at 24.
[401] *Ibid.* at 27-28.

In some countries in Africa, NHRIs are negatively perceived as being beholden to government so that they cannot bite the hands that feed them. For example, in Cameroon, the establishment of the National Commission for the Promotion and Protection of Human Rights produced a mixed reception. The general public and the media questioned the credibility of the newly established institution by raising questions on how the government could establish an institution that would criticize it. Other critics viewed the institution as a façade to cover up government human rights abuses.[402] If victims of human rights violations develop negative attitudes toward a NHRI, they are likely to lose confidence in the institution.

7. Conclusions

The preceding analysis indicates that: first, the establishment of the regional human rights system in Africa was prompted by a series of incidences of egregious human rights abuses and a constant insistence from the international community. Some state donors which called upon African governments to end human rights abuses and establish regional institutions for the protection and promotion of human rights. The African human rights system has various weaknesses and limitations which emanate from the substantive provisions of the African Charter and its mechanisms of implementation.[403]

Second, it is observed that NHRIs in Africa were first established back in the 1960s, although the momentum of their establishment only materially grew in the 1990s. The UN, other international organizations, and state donors have rendered advisory services, and technical and financial support for the evolution of NHRIs in

[402] Kamal, *supra* note 13 at 181.
[403] Rehman, *supra* note 19 at 265.

Africa. However, criticisms have been leveled against these players for taking a blanket approach in supporting façade institutions in Africa.[404]

Third, the OAU encouraged the establishment of NHRIs in Africa through certain provisions in the African Charter and the African Commission. However, this encouragement of NHRIs was a mere advocacy-oriented approach. There were no significant attempts by the OAU to support the development of NHRIs through, for example, the provision of financial and technical assistance similar to that provided by the UN. The replacement of the OAU by the AU did not make a significant change in terms of approach towards NHRIs.

Fourth, it is noted that most of the legal frameworks of NHRIs in Africa contain various provisions which limit the effective performance of NHRIs in Africa. These limiting provisions undermine aspects of NHRI activity related to their independence. Notably, the appointment of the members of NHRIs is usually made by the executive. There are limitations on the powers of investigation, and there is inadequate funding for NHRIs.

However, there are a few NHRIs in Africa which have notable features that can enhance institutional effectiveness by ensuring that the independence of these NHRIs is well protected by law. For example, the NHRIs in Ghana and South Africa have effective legal safeguards regarding matters of appointment of members, mandates, powers, accountability, and enforcement mechanisms. The following chapter examines the law governing Tanzania's NHRI. In light of the Paris Principles, it addresses issues relating to the establishment, termination of office, funding,

[404] Human Rights Watch, *supra* note 10 at 87.

mandates, powers, investigation process, accountability, and enforcement of recommendations.

CHAPTER FOUR

TANZANIA'S COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE (TCHRGG)

1. Background

In 1965, Tanzania established the first ombudsman institution in Africa. This was the second ombudsman in the Commonwealth, preceded only by New Zealand's creation of an Ombudsman in 1962.[405] Tanzania's creation of an analogous Permanent Commission of Enquiry resulted from the proposal made by the Presidential Commission on the Establishment of a Democratic One Party State in Tanzania.[406] The Presidential Commission recommended that the establishment of a Permanent Commission of Enquiry would protect the rights of people against maladministration and abuse of power by public officials.[407] The Permanent Commission of Enquiry was enshrined in the Interim Constitution of 1965 and, in the following year, Parliament passed the governing Act which enabled the Permanent Commission of Enquiry to begin its activities.[408]

However, the Ombudsman in Tanzania suffered from organizational and jurisdictional flaws[409] which rendered it ineffective and unable to respond to complaints which arose in the face of contemporary socio-economic and political

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[405] *Manual*, *supra* note 55 at 11. See also Kamal, *supra* note 13 at 733. See also J.F Mbwiliza, "The Permanent Commission of Enquiry: For Justice and Promotion of Human Rights in Tanzania" in Linda C. Reif, ed., *The International Ombudsman Yearbook*, Vol. 3 (London: Kluwer Law International, 1999) at 156. See also V. Ayeni, Linda Reif & H. Thomas, eds., *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (London: Commonwealth Secretariat, 2000) at 160.

[406] M.G.J. Kimweri, "Twenty-Five Years of the Permanent Commission of Enquiry: Dream and Reality" (1992) 10 The Ombudsman Journal 95 at 96.

[407] *Ibid.*

[408] *Ibid.* at 95.

[409] Generally, the powers of the Ombudsman in Tanzania were limited to complaints relating to maladministration and abuse of powers by public officials.

change in Tanzania. The Permanent Commission of Enquiry was created in the context of a one-party state, a centralized economy, and a Bill of Rights-free constitution. However, these features were drastically altered in the late 1980s and the early 1990s. In the 1980s the government liberalized its economy and enshrined a Bill of Rights in the country's Constitution.[410] The *Constitution of Tanzania* was amended to include provisions which changed the system of government from a one party to a multiparty state.[411] The *Political Parties Act* of 1992 was enacted to provide for registration, operation, and deregistration of political parties in Tanzania.[412]

Following these changes, Tanzania adopted a hybrid human rights ombudsman model which was given a much broader mandate than a traditional ombudsman.[413] In May 2000, Tanzania amended its Constitution to include provisions which created the TCHRGG, and this hybrid institution became operational in 2001.[414] The constitutional launch of the TCHRGG and the passage of more detailed enabling legislation was a significant step, a sign that Tanzania has become more committed to respecting and protecting human rights domestically.[415] The main focus of this chapter is a review and critique of the regulatory framework of the TCHRGG.

The independence of any NHRI is of paramount importance to its proper performance. Should the independence of a NHRI be restricted, its efficiency and effectiveness are likely to be undermined. Accordingly, the Paris Principles identify

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[410] *Constitution of the United Republic of Tanzania of 1977*, as amended in 2000, chapter 1[*Constitution of Tanzania*]. See also Halfani and Nzomo, *supra* note 11 at 5.
[411] *Ibid.*, Art. 3.
[412] *Political Parties Act*, 1992, Act No. 5 of 1992.
[413] Reif, *supra* note 9 at 11.
[414] *Constitution of Tanzania*, *supra* note 410, Art. 129(1).
[415] *Commission Act*, *supra* note 370.

situations that are closely linked to the independence of a NHRI.[416] The Paris Principles suggest that a NHRI be free from any government interference whatsoever.[417] The TCHRGG is not yet completely free from government interference. Although the *Commission Act* explicitly states that the TCHRGG shall be free from any direction or control whatsoever,[418] loopholes continue to exist which can provide the government with an opportunity for interference in the TCHRGG's activities. Any government interference in the TCHRGG's operations can compromise the TCHRGG's independence. The Paris Principles state that the establishment, mandate, and powers of NHRIs should be established by law.[419] This standard is satisfied in Tanzania as the TCHRGG is enshrined in the country's constitution and spelled out in the governing legislation.[420] The Paris Principles also address issues of NHRI independence in the context of appointment and remuneration of commissioners, financial autonomy, mandates and powers of NHRI, accountability, and investigations conducted by the NHRI. These aspects will be addressed in the following sections.

2. Appointment of Commission for Human Rights and Good Governance

A. Method of Appointment

The process of appointing the TCHRGG can, in large measure, determine whether or not it will be independent and effective. The *Constitution of Tanzania* provides for the creation and composition of an appointments committee.[421] The

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[416] *Paris Principles, supra* note 4, A. Competence and Responsibilities, paras.1 & 3, and B. Composition and Guarantees of independence and Pluralism, paras.1-3.
[417] *Ibid.*, 4, B. Composition and Guarantees of Independence and Pluralism, para. 2.
[418] *Commission Act, supra* note 370, s. 14(1).
[419] *Ibid.*, A. Competence and Responsibilities, paras. 1-2.
[420] *Constitution of Tanzania, supra* note 410, Art. 129.
[421] *Ibid.*, Art. 129(4)

appointments committee makes recommendations to the President concerning the appointment of the commissioners. The *Constitution of Tanzania* states that the appointments committee shall be composed of the Chief Justice of Tanzania Mainland, Speaker of the National Assembly, Chief Justice of Zanzibar, Speaker of the Representative Council, and Deputy Attorney-General.[422] Given the positions of individual members, it is to be expected that the appointments committee will be independent in its decisions. Additionally, the law stipulates that before the names of applicants are submitted to the appointments committee, the Minister for Justice and Constitutional Affairs is legally empowered to define the selection procedure to be used by the appointments committee.[423] Before submitting the names of candidates to the appointments committee, candidates have to be short-listed. The law requires that during the process of short-listing candidates, members of civil society and professional human resource personnel (from the private sector) should be involved in the screening process.[424] The small committee responsible for the initial screening of candidates' names does not participate in the work of the appointments committee.

The small screening committee is composed of two civil servants from the Department of Human Resources, and several representatives from various NGOs, the Faculty of Law at the University of Dar es Salaam, the Tanganyika Law Society (TLS), the Legal and Human Rights Centre (LHRC), the United Nations Association of Tanzania (UNA), and the Zanzibar Legal Services Centre (ZLSC).[425] The names of proposed candidates are taken before the appointments committee which is

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[422] *Ibid.*
[423] *Commission Act*, *supra* note 370, s. 7(4).
[424] *Commission for Human Rights and Good Governance (Appointments, Procedure for Commissioners) Regulations, 2001*, s. 6(2) [*Regulations for Appointments*].
[425] *Ibid.*

responsible for publishing the names of short-listed candidates, inviting comments from the members of the public, and calling candidates to appear for interviews.[426] The law requires that the appointments committee should recommend not less than three names for the position of chairperson, not less than three names for the position of vice chairperson, at least five names in addition to the required number of commissioners, and at least five names in addition to the required number of assistant commissioners.[427] Finally, the names of the proposed appointees are handed over to the President who makes the appointments.[428]

The appointment process appears by its nature to involve a cross-section of society in the screening process for prospective candidates. The method of appointment seems, in this respect, to fall within the purview of the Paris Principles which provide that the procedure for creating NHRIs should involve civil society and organizations concerned with the protection and promotion of human rights.[429] However, there are two significant weaknesses of the appointment process. First, the composition of each committee (small committee and appointments committee) does not involve representatives from opposition parties. The screening process can be strengthened by involving opposition party representatives in the screening and appointments committees because they are more likely to act as *watch dogs* to prevent or reduce government favoritism in the selection of candidates. Second, the appointment of commissioners is directly controlled by the executive branch. The Minister responsible for human rights matters determines the remuneration of

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[426] *Ibid.*, ss. 6(4), 7, & 8.
[427] *Ibid.*, s. 9.
[428] *Constitution of Tanzania*, *supra* note 410, Art. 129(3).
[429] *Paris Principles*, *supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 1.

members of the small screening and appointments committees, and any person involved in the appointment process.[430] The Minister for Justice and Constitutional Affairs is legally empowered to issue a government notice which defines the procedures to be followed by the appointments committee. The same Minister has the mandate to create the small screening committee. Also, the President is responsible for making the final appointment of commissioners. However, the President is required to act upon the recommendations made by the appointments committee and cannot appoint any person other than those persons proposed by the committee.[431]

B. Composition of and Qualifications for Commissioners

1. Composition

The independence of any NHRI hinges, to some extent, on the composition of its members.[432] Some countries in Africa adopted multi-member NHRIs, which to them offered comparative advantages over a single-member NHRI.[433] The UN seems to support the multi-member model, and the Paris Principles recommend pluralistic compositions for NHRIs, that is, those that reflect a representational cross-section of society.[434] An insistence that commissioners should come from different backgrounds enables a NHRI to better represent the various stakeholders in society.[435] Diversity is recommended, as commissioners from different sections of society bring varied perspectives that are likely to have an enriching effect on the NHRI.

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[430] *Regulations for Appointments, supra* note 424, s. 10.
[431] *Commission Act, supra* note 370, s. 7(2).
[432] *Handbook, supra* note at 2, para. 77.
[433] *Manual, supra* note 55 at 22.
[434] *Paris Principles, supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 1.
[435] *Ibid.*

The *Constitution of Tanzania* does not clearly articulate the number of members of the TCHRGG. It deems that the TCHRGG shall have a chairperson, a vice chairperson, not more than five commissioners, and a non-prescribed number of assistant commissioners.[436] As a result, it is difficult to establish with certainty the exact number of commissioners and assistant commissioners that should or will be appointed at any particular time. Further, one may contend that leaving such ambiguity can have a negative impact on the independence of the TCHRGG since the executive branch, to a considerable extent, controls both the appointment process, and the number of commissioners and assistant commissioners appointed. On the one hand, the President can use such ambiguity to appoint as many supporters of the executive branch as possible in order to influence the decisions of the TCHRGG. On the other hand, the President can limit the number of commissioners and assistant commissioners so as to weaken the operations of the TCHRGG in reaching people, especially in rural areas. According to the 2001-2002 annual report of the TCHRGG, 65% of complaints received come from Dar es Salaam where the head office of the TCHRGG is located.[437] Further, the report notes that there are very few (1.5%) complaints from remote regions such as Rukwa and Singida.[438]

Computer applications could facilitate the communication required to deal with more cases from the countryside. However, it should be noted that some parts of Tanzania have no access to electricity or wireless satellite technology, making the use

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[436] *Constitution of Tanzania*, *supra* note 410, Art. 129(2). See also *Commission Act*, *supra* note 370, s. 79(1)(d).
[437] Tume ya Haki za Binadamu, *Taarifa ya Mwaka ya Tume ya Haki za Binadamu na Utawala Bora Julai 2001-Juni 2002* (Dar es Salaam: Mpigachapa Mkuu wa Serikali, 2002) at 14 [Tume ya Haki ya Binadamu].
[438] *Ibid.*

of computer applications impossible. Therefore, securing a large number of commissioners and assistant commissioners would best ensure the TCHRGG's accessibility to every person in the country because more commissioners would be able to focus on rural complaints by going on circuit.

Currently, the TCHRGG has seven members. The number of assistant commissioners is not recorded. According to the 2001-2002 TCHRGG annual report one of the factors negatively affecting effective performance of the TCHGG is the lack of adequate personnel to handle the large volume of complaints received.[439] For example, at that time the TCHRGG had a total of 3,206 pending complaints[440] yet only 6 complaints had been concluded.[441]

2. Qualifications

A. Chairperson

The *Commission Act* clearly provides that the chairperson "...shall be a person qualified for appointment as Judge of the High Court or a Judge of the Court of Appeal...".[442] This provision ensures that in all cases the chairperson of the TCHRGG will have legal training. However, it would be better if the qualifications of the chairperson include expertise in human rights activities, insofar as a legal and judicial background does not necessarily mean that the chairperson will be sensitive to, or an expert in, human rights issues. Prior human rights experience is strongly preferable. For example, this may include experience in human rights activism, human rights education, or law-related activities involving human rights issues.

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[439] *Ibid.* at 198.
[440] *Ibid.* at 14.
[441] *Ibid.* at 187.
[442] *Commission Act, supra* note 370, s. 7(1)(a). See also *Constitution of Tanzania, supra* note 410, Art. 129(2)(a).

Past experience indicates that some lawyers and judges in Tanzania are insensitive to human rights concerns. The history of Tanzania has been marked by the "...over cautiousness or sheer timidity of some of the judges, when interpreting human rights provisions...".[443] The role of chairperson is such an important and key position that the incumbent must have sufficient experience in the areas of human rights. For these reasons, at a minimum, the law should provide that the chairperson of the TCHRGG must have demonstrable human rights experience without putting much emphasis on judicial qualifications because doing so limits the pool of qualified candidates.

B. Vice Chairperson

Interestingly, the *Commission Act* sets forth only one qualification for the position of vice chairperson. The law provides that the vice chairperson "... shall be appointed on the basis of the principle that where the chairman hails from one part of the United Republic then the vice chairman shall be a person who hails from the other part of the Union...".[444] Unfortunately, the *Commission Act* is silent on any educational or professional qualifications for the candidate aspiring to such position. Moreover, the statutory provision is defective in that the appointing authority has the discretion to appoint any person and this appointment cannot be legally challenged. Consequently, the vice chairperson's position can be granted to someone who is unqualified for the role. A statutory provision setting out relevant professional

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[443] Chris Peter Maina, *Human Rights in Tanzania: Selected Cases and Materials* (Koln: Rudiger Koppe: 1997) at ix [Peter].

[444] *Commission Act, supra* note 370, s. 7(1)(b). See also *Constitution of Tanzania, supra* note 410, Art. 129(2)(b).

qualifications for the vice chairperson would have been preferable, including a requirement for human rights expertise.

C. Commissioners

The *Commission Act* does provides that commissioners shall be "...appointed from amongst persons who have knowledge, experience and a considerable degree of involvement in matters relating to human rights, law, government, politics, or social affairs...".[445] Apart from these qualifications, the law requires that a prospective candidate have "...the highest reputation and is known for his high morality, integrity and impartiality and competence in matters of human rights and good governance...".[446] Despite setting this requirement, the law does not state the criteria for determining the reputation, morality, integrity, and impartiality of applicants.

D. Assistant Commissioners

The *Commission Act* is silent on professional qualifications for assistant commissioners.[447] However, the law requires that an applicant must have "... the highest reputation and is known for his high morality, integrity and impartiality and competence in matters of human rights and good governance...".[448] The law should also provide for the professional qualifications for assistant commissioners emphasizing on human rights expertise because they are the ones who handle most of human rights work in the TCHRGG.

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[445] *Commission Act, ibid.*, s. 7(1)(c).
[446] *Ibid.*, s. 7(3).
[447] *Ibid.*, s.7(1)(d). See also *Constitution of Tanzania, supra* note 410, Art. 129(2)(d).
[448] *Commission Act, ibid.*, s. 7(3).

3. Termination of Office

The TCHRGG legislation provides general conditions that can lead to the termination of service of commissioners. The power of and procedure for removing commissioners from office is effectively within the control of the President. The law provides that "...a Commissioner may be removed from office for inability to perform the functions of this office, due to illness or to any other reason, or for misbehaviour inconsistent with the ethics of office or any law concerning ethics of public leaders...".[449] These conditions do not seem to apply to assistant commissioners.

The President of Tanzania does not have the power to remove commissioners from office until a special tribunal, applying the above noted criteria in the *Commission Act*, advises the President to do so.[450] Remarkably, the *Commission Act* gives the President the power to appoint the special tribunal to undertake an investigation once allegations have been leveled against any commissioner.[451] Further, the law requires that fifty percent of the members of the tribunal should be judges.[452] Judges in Tanzania are appointed by the President. Where the President is determined to terminate any commissioner's office, he can do so by appointing supportive judges to the special tribunal, and, since they will constitute one half of the membership, in any voting situation a bloc of judges is likely to form the majority vote in the tribunal. While the special tribunal should be maintained, the law on the TCHRGG would be more effective if the power to appoint its members was given to Parliament which is more broadly representative of the population and less likely to be biased.

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[449] *Ibid.*, s. 10(1).
[450] *Ibid.*, s. 10(2)(c).
[451] *Ibid.*, s. 10(2)(a).
[452] *Ibid.*

An investigation into allegations against any commissioner must be concluded within ninety days of the formation of the tribunal.[453] In the course of the investigation, the President is empowered to suspend the commissioner under allegation from his/her duties.[454]

4. Remuneration, Tenure of Office, and Relinquishment of Previous Public Offices

NHRIs are likely to obtain and retain more effective members if the governing legislation guarantees favourable terms and conditions of service for potential members. In support of this, the Paris Principles recommend that adequate funding should be provided for the NHRI to enable it obtain its own staff.[455] However, it is not clear whether or not a reference to "staff" in the Paris Principles also refers to remuneration of commissioners. Further, the Paris Principles emphasize that the tenure of commissioners should be legally defined.[456]

In the case of the TCHRGG, the President has the authority to determine the commissioners' salaries, and all salaries are sourced from a consolidated fund.[457] Executive control over TCHRGG salaries may have a negative influence on the independence of TCHRGG decision-making. An arrangement which would better protect the independence of the TCHRGG would be to empower Parliament to determine all remuneration for commissioners and assistant commissioners. This could be done by allowing the TCHRGG to draft its own budget, including salaries,

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[453] *Ibid.*, s. 10(2)(b).
[454] *Ibid.*, s. 10(3).
[455] *Paris Principles, supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 2.
[456] *Ibid.*, para. 3.
[457] *Commission Act supra* note 370, s. 8(3).

and to submit it before Parliament as a special budget, rather than by presenting it through a ministerial budget.

It is important to remunerate TCHRGG commissioners and assistant commissioners adequately. This also helps to maintain the independence of the TCHRGG by avoiding a situation where the TCHRGG's decisions are influenced indirectly through financial dependence upon other authorities.

The *Commission Act* guarantees security of tenure to commissioners for a period of three years, which can be extended through reappointment for a further two years, for a maximum total of five years.[458] Commissioners beyond 65 years of age cannot be reappointed.[459] Under normal circumstances, once the President appoints a commissioner whose age is approaching 65 years technically such a commissioner will not be able to serve the TCHRGG for more than three years. Even where this does not apply, reappointment is not guaranteed. Thus, commissioners can only be assured of three years' tenure. Also, activist commissioners or those who jeopardize the interests of the President or those of his close friends and family may not be reappointed by the President. During their initial tenure commissioners in this position may try to curry Presidential favour, so as to secure a chance for reappointment. Also, where the TCHRGG might be tabling a case in which the President has vested interests, commissioners could favour a decision which would benefit or appease the President. These scenarios, where commissioners are not certain of their prospects for reappointment, contribute to an erosion of the independence of the TCHRGG. To

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[458] *Ibid.*, s. 8(1).
[459] *Ibid.*, s. 8(2).

avoid these situations, the law should be amended to provide for an appointment of five years without the possibility of reappointment.

In any event, a three-year appointment for commissioners seems too short. The argument for extending it to five years is based on the fact that not all commissioners are conversant with human rights issues at the time of their appointment given the legislative provisions on qualification.[460] Therefore, sufficient time should be granted to enable them to learn to deal with human rights issues and violations. A period of three years is simply not enough for commissioners to gain sufficient experience.

In order to avoid conflicts of interest, the *Commission Act* provides that applicants, upon their appointment to the TCHRCC, are required to vacate previous public offices.[461] The intention of such a requirement is to preserve the freedom of commissioners to deal with any and all complaints lodged with the TCHRGG.

However, the law is silent regarding those commissioners who join the TCHRGG from the private sector. The law selectively identifies only a few public positions which prospective commissioners would be required to vacate upon their appointment.[462] The law would be strengthened if it required all commissioners to vacate their previous offices or positions before their appointment. The silence of the law regarding commissioners coming from private sector positions tacitly allows such commissioners to continue maintain these positions. By the same logic advanced above, commissioners from the private sector need to forestall possible conflicts of interest occurring where complaints are lodged before the TCHRGG and those

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[460] *Ibid.*, s. 7.
[461] *Ibid.*, s. 9(1). See also *Constitution of Tanzania, supra* note 410, Art. 129(6).
[462] *Commission Act, ibid.*, s. 9(1).

complaints are linked to their private interests. Such a situation would just as readily undermine the effective independence of the TCHRGG.

5. Funding Sources of the Commission for Human Rights and Good Governance

As discussed in previous sections, it is argued that NHRIs must have control over their budgets and be able to access the funds allocated to them preferably by parliament.[463] This requirement reinforces the notion that NHRIs must have and maintain independence from the executive branch and that no other government bodies should be able to influence their decisions unduly. As was also noted above, NHRIs should have their own budget independent of the omnibus budgets of government departments and they should be allowed to secure funds from other sources.[464] These are prerequisites for NHRIs to be able to preserve their independence.

To this end, the law in Tanzania permits the TCHRGG to receive funds from any source, although it does not provide for material independence in sourcing these funds. The TCHRGG can receive funds apportioned to it by Parliament through the Ministry of Justice and Constitutional Affairs.[465] However, there is the possibility that the Ministry of Justice and Constitutional Affairs will reduce the amount of funds given to the TCHRGG. Such an event would significantly reduce the TCHRGG's independence. Although the TCHRGG is allowed to draft its own budget, this is subject to the scrutiny of the Minister for Justice and Constitutional Affairs.[466] Further, the TCHRGG is required to abide by advice given by the Minister of

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[463] *Handbook*, *supra* note 2 at 11, para. 74.
[464] *Ibid.*, paras. 75-76.
[465] *Commission Act*, *supra* note 370, ss. 29(a), & 31(1)-(2).
[466] *Ibid.*, s. 31(1).

Finance.[467] This requirement causes the TCHRGG to become subject to the views of the executive via the Minister of Finance. Indeed, this is a clear deviation from the recommendation of the Paris Principles that NHRIs should draft and control their own budgets and that they are not to be made part of a government department or ministry's direct financial budgeting.[468] The *Commission Act* does, however, provide for other sources of funds "...accruing to the Commission from any other source; or which are donations or grants from sources within or outside the United Republic...".[469] With this provision, the TCHRGG is able to solicit funds from external sources such as foreign states and donors. However, the 2001-2002 annual report of the TCHRGG shows that external funding was supplied only by Denmark and, overall, the TCHRGG lacks adequate funding for its operations.[470]

6. Mandates of the Commission for Human Rights and Good Governance.

The UN contends that the mandate of NHRIs should be legally and clearly defined in such a way that the mandate does not conflict or overlap with the jurisdictions of other government bodies.[471] Also, the Paris Principles state that NHRIs should be given as broad a mandate as possible.[472]

The TCHRGG is entrusted with an extremely broad range of functions.[473] These extensive functions demonstrate that the TCHRGG is a hybrid NHRI with three broad mandates. First, it is tasked with a variety of functions related to the protection and promotion of human rights based on the human rights commission model.

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[467] *Ibid.*, s. 31(2).
[468] *Handbook*, *supra* note 2 at 11, para. 75.
[469] *Commission Act*, *supra* note 370, s. 29(b).
[470] Tume ya Haki za Binadamu, *supra* note 437 at 198.
[471] *Handbook*, *supra* note 2 at 12, para. 91.
[472] *Paris Principles*, *supra* note 4, A. Competence and Responsibilities, para. 2.
[473] *Commission Act*, *supra* note 370, s. 6. See also Appendix IV at 176.

Second, it has the responsibility to deal with administrative justice and maladministration issues based on the ombudsman model. Third, the TCHRGG is given a distinct mandate to address good governance issues.[474]

Regarding the multiple mandates accorded to the TCHRGG, several arguments can be made in support of such a broad spectrum of responsibilities. First, the TCHRGG can deal with human rights issues on a broader scale because its functions cover a wide range of human rights areas. Second, the TCHRGG is able to strengthen vertical and horizontal accountability of government administration.[475] In vertical accountability, the TCHRGG has mandates to allow members of the public to lodge complaints against government's illegal or unfair actions. In horizontal accountability, the TCHRGG has mandates to investigate government decisions or actions.[476] Third, regarding mandates of the TCHRGG, Professor. Linda Reif notes that:

> In addition to giving the Commission functions to investigate and follow up on human rights violations and injustice committed by the public administration, the legislation confers a research function on the Commission which includes good governance issues, and it also empowers the Commission to propose changes to legislation to ensure compliance with human rights norms and the principles of good governance.[477]

The TCHRGG is one of the first NHRIs in Africa to be given an express good governance promotion mandate. Good governance covers a variety of initiatives to improve state institutions and governance, including improving government administration and human rights protection. Fourth, it is more cost-effective and

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[474] *Ibid.* See also *Ombudsman, supra* note 8 at 77.
[475] *Ombudsman, ibid.* at 59-62.
[476] *Ibid.* at 59.
[477] *Ibid.* at 77. See also *Commission Act, supra* note 370, s. 6(1)(d)&(k).

human resource effective for TCHRGG to use a single hybrid institution rather than several NHRIs.[478]

Observing the range of functions entrusted to the TCHRGG, a criticism is that the TCHRGG is unlikely to be able to fulfill all its mandates adequately unless it is staffed with sufficient and competent staff, supplied with adequate funds, and supported by the government. According to a World Bank Group report, Tanzania has a total GDP that ranked 94 out of 184 countries in 2004.[479] Although Tanzania is in the middle of this ranking and ought to have sufficient funds to support the TCHRGG adequately, it appears the government has not given priority to supporting TCHRGG operations especially in terms of funds allocation. If the TCHRGG is not consistently given adequate resources, it will become overburdened and at least some of the responsibilities outlined in the enabling legislation, if not many of them, will be left unfulfilled. The 2001-2002 TCHRGG annual report indicates that the TCHRGG was only able to conclude 6 complaints out of 3,311 pending during the year under review.[480] The report also observes that one of the challenges facing the TCHRGG is the lack of adequate resources to enable it to fulfill its functions as provided in the governing legislation.[481] Also, the effect of a lack of adequate resources is reflected in the delay in issuing and making public the TCHRGG's annual reports. For example, during the writing of this thesis the latest TCHRGG annual report available was that for the 2001-2002 period.

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[478] *Ombudsman, ibid.* at 89.
[479] The World Bank Group, online: World Development Indicators-2004, <http://www.worldbank.org/databytopic/GDP.pdf> [last visited November 2, 2005].
[480] Tume ya Haki za Binadamu, *supra* note 437 at 198.
[481] *Ibid.* at 199.

7. Powers of the Commission for Human Rights and Good Governance

Setting forth the broad mandates of a NHRI in a constitution or statute does not necessarily guarantee their effective performance. These institutions also need sufficient powers to fulfill the functions legally entrusted to them. Underpinning this, the Paris Principles consider investigating complaints to be an optional power for NHRIs, although they do recommend that NHRIs with investigatory powers should be empowered to deal with all admissible complaints regardless of the party who submits them.[482] Further, the Paris Principles underscore that NHRIs should consult with other institutions involved in human rights issues.[483] The Paris Principles also emphasize that NHRIs should be given powers to: publicize their recommendations and opinions,[484] obtain any information and documents necessary for the determination of complaints,[485] decentralize their operations,[486] and maintain good relations with NGOs.[487]

Concerning those NHRIs with the power to investigate human rights complaints, the Paris Principles provide guidelines for dealing with complaints including an emphasis on amicable methods of settling disputes and recourse to binding decisions governed by the limits of the law and maintenance of confidentiality.[488]

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[482] *Paris Principles*, *supra* note 4, C. Methods of Operation, para. 1.
[483] *Ibid.*, para. 6.
[484] *Ibid.*, *at* A. Competence and Responsibilities, para. 3.
[485] *Ibid.*, para. 2.
[486] *Ibid.*, para. 5.
[487] *Ibid.*, para. 7.
[488] *Ibid.*, para. 1.

The TCHRGG has been given the broad power "...to investigate any human rights abuses or maladministration...".[489] It is authorized either to initiate *suo moto* (own motion) investigations or conduct investigations upon receipt of a complaint from any natural person, legal person, or any person acting on behalf of others.[490] After the investigation of an admissible complaint, the TCHRGG has various courses of action. First, it is authorized to encourage compromise and amicable settlement between respondents and complainants. However, the law is not clear whether complaints related to maladministration and good governance can be resolved by compromise and amicable means.

Amicable settlement of disputes is preferred whenever the circumstances allow such an approach to be adopted by the TCHRGG.[491] If a complaint is not settled amicably, the TCHRGG has the power to report both the complaints received and its findings to the institution or person against whom the complaint has been leveled.[492] Also the TCHRGG has the power to make recommendations calling on the relevant authority to take measures that will lead to effective settlement, remedy, or redress.[493] The TCHRGG has both the power to bring an action in any court of law in order to seek any relief which may be available from that court and the power to go to court to enforce its own recommendations.[494] Such powers are not unprecedented: Ghana, Uganda, and South Africa have the power to institute court proceedings; Ghana and Uganda have the additional power to enforce their own recommendations through

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[489] *Commission Act*, *supra* note 370, s. 15(1).
[490] *Ibid.*, s. 15(1)(a) &(b).
[491] *Ibid.*, s. 15(2)(a).
[492] *Ibid.*, s. 15(2)(b).
[493] *Ibid.*, s. 15(2)(C).
[494] *Ibid.*, ss. 6(1) (e), (i), 15(3), and 28(3).

court orders.[495] However, the power to enforce recommendations through court orders is still relatively unusual among NHRIs.

Although the TCHRGG has powers to institute a suit in a court of law, such a procedure has many stumbling blocks. For example, the *Constitution of Tanzania* provides that any human rights complaints should be instituted in the High Court of Tanzania which has original jurisdiction over human rights cases.[496] Also the *Basic Rights and Duties Enforcement Act,* 1994 provides that any case involving violations of human rights should be lodged before the High Court of Tanzania and that a full bench of judges should hear such cases.[497] Owing to the backlog of cases, shortage of judges, and the existence of fewer High Court zones in Tanzania, it may be virtually impossible for the High Court of Tanzania to deal effectively with cases of human rights violations and actions brought by the TCHRGG in a timely and efficient way. Currently there are only 37 judges in 11 High Court zones.[498]

In addition, the TCHRGG has several special powers that are ordinarily exercised by the courts in Tanzania. First, it can issue summons, require attendance of any person before the TCHRGG, and require any person to furnish evidence with respect to a complaint under investigation.[499] The person may be ordered to furnish any information or produce any documentary evidence in his custody.[500] The TCHRGG invokes these powers if it deems it necessary for its investigations. Second,

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[495] *Administrative Justice Act, supra* note 370, s. 18(2); the *Constitution of Uganda,* 1995, *supra* note 374, Art. 53(3); and *South African Human Rights Commission Act,* 1994, No.54, 1994, s. 7(1)(e)[*South Africa Human Rights Act*].

[496] *Constitution of Tanzania, supra* note 410, Art. 30(3).

[497] See *Basic Rights and Duties Enforcement Act,* 1994, Act No. 33, ss. 9(1)-10(1) [*Basic Rights Enforcement Act*].

[498] Government of Tanzania, online: Administration: the Government Structure in Summary, <http://www.tanzania.go.tz/administration.html> [last visited November 2, 2005].

[499] *Commission Act, supra* note 370, s. 25(c).

[500] *Ibid.,* s. 25(a).

the TCHRGG is empowered to examine any person in respect of any complaint under investigation.[501] Third, the TCHRGG has powers to grant interim orders and enter and inspect any premises, seize material, and cause any persons deemed in contempt to be prosecuted before an appropriate court of law.[502]

The TCHRGG has the powers to conduct research in the areas of "...human rights, administrative justice and good governance issues and to educate the public about such issues...".[503] The TCHRGG is granted the power to visit prisons and related facilities with the view to inspect and assess the conditions and make recommendation to redress the existing problems.[504] Also, the TCHRGG can advise government and public and private institutions on matters relating to human rights and administrative justice.[505] Further, the TCHRGG can "...make recommendations relating to any existing or proposed legislation, regulations, or administrative provisions to ensure compliance with human rights norms and standards and with the principles of good governance...".[506] In making recommendations, the TCHRGG has to ensure that any proposed or existing law complies with both human rights standards and good governance principles. Also, the TCHRGG has the power to promote Tanzania's ratification of or accession to international treaties on human rights, and monitor and assess compliance of the state obligations provided for in the treaties.[507]

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[501] *Ibid.*, s. 25(b).
[502] *Ibid.*, s. 25(d), (e)&(f).
[503] *Ibid.*, s. 6(1)(d).
[504] *Ibid.*, s. 6(1)(h).
[505] *Ibid.*, s. 6(1)(j).
[506] *Ibid.*, s. 6(1)(k).
[507] *Ibid.*, s. 6(1)(a) &(j).

The TCHRGG can also launch enquiries on any matter provided it is related to human rights violations or abuse of administrative justice.[508]

In the course of dealing with human rights complaints, the TCHRGG has powers over public and private entities, but when dealing with administrative justice complaints the TCHRGG can deal with all public institutions and private entities exercising public offices.[509] This is because complaints involving administrative justice concern public administration only.

The Paris Principles emphasize that an NHRI should be provided with such an infrastructure that facilitates its smooth functioning.[510] Also, the UN maintains that its "...independent legal status should be of a level sufficient to permit an institution to perform its functions without interference or obstruction from any branch of government...".[511] It may be argued that these recommendations discourage the inclusion of any unnecessary limitation clauses in a NHRI's governing legislation. However, the powers of the TCHRGG are limited in such a way that it has no power to investigate matters relating to certain persons and cases.

First, the TCHRGG is not authorized to carry out investigations or institute proceedings against the President of the United Republic of Tanzania or the President of the Revolutionary Government of Zanzibar.[512] Thus, implicitly, the law allows both Presidents to commit human rights violations and administrative injustices without being subject to the TCHRGG's scrutiny. In fact, the *Constitution of Tanzania* gives

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[508] *Ibid.*, s. 6(1)(c).
[509] *Ibid.*, s. 6(1)(g).
[510] *Paris Principles, supra* note 4, B. Composition and Guarantees of Independence and Pluralism, paras. 2-3.
[511] *Handbook, supra* note 2 at 10, para. 70.
[512] *Commission Act, supra* note 370, s. 16(1).

enormous powers to both Presidents.[513] This keeps the possibility open for progression into tyranny, should powers not be used justly. The TCHRGG could become one means of keeping any abuse of powers in check. If the law could be amended to permit both Presidents to be placed under the TCHRGG's scrutiny for violations of human rights and administrative justice they might be induced to become more scrupulous in their actions.

Second, the TCHRGG has no powers to investigate:

> (a) a matter which is pending before a court or other judicial tribunal;
> (b) a matter involving the relations or dealings between the Government and the Government of any foreign State or an international organization;
> (c) a matter relating to the prerogative of mercy;
> (d) a matter on which the President directs otherwise in accordance with the provisions of the Constitution.[514]

With respect to matters mentioned in paragraphs (a), and (b), it is commonly accepted that NHRIs do not deal with matters which are pending before other government institutions. Paragraph (c), however, leaves the prerogative powers of the President unchecked. The prerogative powers in Tanzania permit the President to pardon any person convicted of any office, substitute less severe punishment for any punishment imposed on any person for any offence, or remit part or the entire punishment.[515] Paragraph (d) gives the President broad discretionary powers to halt any investigations at any time, although the President can only do so in accordance with the provisions of either the *Constitution of Tanzania* or enabling legislation.[516] Also,

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[513] *Constitution of Tanzania, supra* note 410, Art. 36.
[514] *Commission Act, supra* note 370, s. 16(2).
[515] *Constitution of Tanzania, supra* note 410, Art. 45(1).
[516] *Ibid.*, Art 130. See also *Commission Act, supra* note 370, s. 16(4).

paragraph (d) does not specify the grounds upon which the President can prevent an investigation.

Third, the law empowers the President to order discontinuance of any investigation that is deemed to place national defense or security at risk.[517] However, the law does not provide for criteria under which the President must arrive at his decision to prevent an investigation by the TCHRGG.

The *Constitution of Tanzania* and the *Commission Act* grant broad discretionary powers to the President enabling him/her to prevent or halt TCHRGG investigations. Although the President has no power to prevent investigations conducted by courts of law or any other tribunals, complainants whose human rights have been violated and who seek remedies before the High Court of Tanzania are likely to stumble on hurdles raised by the *Basic Rights and Duties Enforcement Act* of 1994 which requires that any allegations involving human rights violations should be dealt with by the High Court of Tanzania before a full bench of judges.[518]

8. Commission for Human Rights and Good Governance Investigation Process

The Paris Principles suggest that a wide range of petitioners should be eligible to complain to a NHRI.[519] In Tanzania, petitioners can be an individual or a group of individuals, and legal persons.[520] Moreover, the law authorizes the TCHRGG to accept written letters containing the complaints of petitioners who are either in custody or in hospital. However, this option is qualified in that the written letter of

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[517] *Ibid.*, s. 16(4).
[518] *Basic Rights Enforcement Act*, *supra* note 497, ss. 9(1) and 10(1). See discussion on High Court problems, *supra* note text accompanying notes at 498 to 500.
[519] *Paris Principles*, supra note 4, D. Additional Principles Concerning the Status of Commissions with Quasi-Jurisdictional Competence, para. 1.
[520] *Commission Act*, *supra* note 370, s. 22(3).

complaint should be forwarded unaltered and expeditiously to the TCHRGG.[521] The law creates a simple procedure for bringing complaints before the TCHRGG. The lodging of complaints is done in two ways: (1) orally and reduced to writing, or (2) in written form.[522] The law does not expressly exclude complainants who are minors and non-citizens,[523] so presumably the TCHRGG can accept complaints from children and non-citizens.

The law, however, qualifies the nature of complaints which can be admitted. First, the TCHRGG cannot deal with complaints where the complainant has had knowledge of the human rights violation for more than two years prior to the TCHRGG's receipt of the complaint.[524] The TCHRGG can deal with a complaint of which a complainant has had knowledge for more than two years if the TCHRGG is satisfied that the matter is of constitutional significance.[525] The circumstances of the complaint should necessitate that the matter be heard and determined by the TCHRGG and it will then entertain the matter on the ground of ensuring that the ends of justice are sustained thereby.[526] Second, the TCHRGG can accept complaints only where the complainant has exhausted all available remedies as prescribed by law.[527] In this regard, it might appear that members of marginalized and disadvantaged groups are likely to have no effective access to the remedies available in courts of law

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[521] *Ibid.*, s. 22(2).
[522] *Ibid.*, s. 22(1).
[523] *Ibid.*, s. 22.
[524] *Ibid.*, s. 22(4) (a).
[525] *Ibid.*, s. 22(5)(b).
[526] *Ibid.*, s. 22(5)(a).
[527] *Ibid.*, s. 22(4)(b).

and, therefore, the TCHRGG could be the sole institution that would provide such victims with quick and effective remedies.[528]

In practice, the prerequisite of exhausting all other available remedies causes unnecessary hardship for victims of human rights violations, and makes it difficult for them to access the TCHRGG. This is because courts of law or administrative bodies in Tanzania take a long time to conclude cases. Unless the TCHRGG interprets broadly the exhaustion of available remedies rule so that in the event available remedies are not provided expeditiously the TCHRGG can take such a case,[529] the rule will inhibit the TCHRGG's ability to deal with human rights violations expeditiously.

With respect to the issue of representation, the law states that any complainant and other interested party have the right to be represented by an advocate or any other suitable person.[530] Should the complainant be unable to appear before the TCHRGG for unavoidable reasons, the law provides that persons of their choice, any member of their families, or any other suitable person shall be empowered to represent such petitioners.[531]

Before conducting any investigation, the TCHRGG is required to serve the respondent and any other interested parties with a notice of complaint. Also, the law requires that a notice should provide "...sufficient opportunity to all parties to whom notice has been given to appear...",[532] so as to enable the parties to attend the inquiry

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[528] Kamal, *supra* note 13 at 828.
[529] *Commission Act*, *supra* note 370 s. 22(4)(b).
[530] *Ibid.*, s. 23(1).
[531] *Ibid.*, s. 23(2).
[532] *Ibid.*, s. 24.

and to prepare for the allegations.[533] After a notice of complaint has been served, and the TCHRGG decides to conduct an investigation, the TCHRGG is required to allow sufficient time for the respondent or representative to respond to the allegations and provide comments on the allegations.[534] Upon receipt of the comments from the respondent or representative, the TCHRGG has the authority to obtain any information from any persons and also to conduct such inquiries, as it deems necessary.[535]

The law provides that all hearings before the TCHRGG should be conducted in public save when the TCHRGG deems it inappropriate to do so.[536] Alternatively, upon any application, if the TCHRGG considers it important to maintain the confidentiality and secrecy of the proceedings, the TCHRGG may give orders to that effect.[537] Nevertheless, before the TCHRGG takes measures to ensure secrecy, it must be convinced that the nature of the complaints falls within the purview of the conditions provided under the law.[538] In furtherance of confidentiality and secrecy, the TCHRGG is authorized to preclude publication of any information relating to evidence or to the identity of anyone involved. Such a decision shall be reached after determining that the need for confidentiality and secrecy supersedes the public interest derived by a public hearing.[539] In this provision, however, the law does not stipulate what kind of public interest shall be considered in deciding to bar or permit the publication of evidence or the identity of a person.

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[533] *Ibid.*
[534] *Ibid.*, s. 26(1).
[535] *Ibid.*, s. 26(2).
[536] *Ibid.*, s. 18.
[537] *Ibid.*, s. 19(1).
[538] *Ibid.*
[539] *Ibid.*, s. 19(2).

Following completion of its investigation, if the TCHRGG decides that the subject matter complained of does amount to a violation of human rights or amounts to maladministration,[540] the TCHRGG shall make a decision and recommendations and forward them to the relevant authority.[541] However, the determination and recommendations made by the TCHRGG are conveyed in a way to encourage mediation and reconciliation between the complainant and the respondent.[542] The law prescribes that within a period not exceeding three months the respondent must provide a detailed report explaining the action taken to remedy the situation.[543]

The TCHRGG has two main offices in Dar es Salaam and Zanzibar.[544] The law allows the TCHRGG to either establish zonal offices or different departments.[545] The TCHRGG created offices in 25 regions and each office has five departments in which each department deals with particular complaints. Between July 2001 and June 2002, the TCHRGG received a total of 3,311 complaints. It inherited from the defunct Permanent Commission of Enquiry a total of 2,237 (or 67.6%) out of 3,311 complaints and received 1,074 (or 32.4%) out of 3,311 new complaints.[546]

The first department deals with all complaints regarding employment within the central government. According to the 2001-2002 annual report, the department received a total of 900 (27.2%) out of 3,311 complaints from central government.[547]

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[540] With respect to maladministration, that a determination was made unreasonably or in contravention of law or based wholly or partly on either a mistake in law or fact or a determination was discriminatory or unjust or oppressive.
[541] *Commission Act, supra* note 370 s. 28(1).
[542] *Ibid.*, s. 6(1)(n).
[543] *Ibid.*, s. 28(2). See Enforcement of TCHRGG recommendations is addressed, *infra* section 10.
[544] Tume ya Haki za Binadamu, *supra* note 437 at 10.
[545] *Commission Act, supra* note 370, s. 13(2).
[546] Tume ya Haki za Binadamu, *supra* note 437 at 11.
[547] *Ibid.* at 12-15. It inherited 227 complaints and received 673 new complaints from central government. Employment complaints comprised the largest percentage of total complaints received in 2001-2002.

Complaints regarding law enforcers, compensation, land disputes, human rights violations, corruption practices, and miscellaneous matters amounted to 758 (22.9%) out of 3,311 complaints.[548] The complaints from various insurance companies totaled 666 (20.1%) out of 3,311 complaints.[549] Complaints regarding the judiciary and justice, labour tribunals, various licensing authorities, gender issues, environment, and tax evasion were 540 (16.3%) out of 3,311 complaints.[550] Complaints regarding employment in public corporations and local governments were 342 (10.2%) out of 3,311 complaints.[551] The Zanzibar office handled a total of 105 (3.2%) out of 3,311 complaints, receiving the lowest percentage of the total number of all complaints received in 2001-2002.[552] This was the result of the delayed operation of the TCHRGG in Zanzibar because the House of Representatives in Zanzibar took some time to endorse the application of the *Commission Act*.[553]

Also, the record indicates that a total of 914 (85.1%) out of 1,074 new complaints were from men and only 89 (8.3%) were from women, 68 (6.3%) new complaints came from various groups, and 3 (0.3%) complaints were initiated by the TCHRGG itself.[554] The foregoing statistics indicates that there was a considerable gender disparity in the complaints received by the TCHRGG from 2001 to 2002. Because of socio-economic and cultural constraints in Tanzania, a majority of women

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[548] *Ibid.* It inherited 296 complaints from the defunct Permanent Commission of Enquiry, and received 462 new complaints.
[549] *Ibid.* It inherited 175 complaints from the Permanent Commission of Enquiry and received 491 new complaints.
[550] *Ibid.* It inherited 237 complaints from the defunct Permanent Commission of Enquiry and received 303 new complaints.
[551] *Ibid.* at 12. It inherited 124 complaints from the defunct Permanent Commission of Enquiry and received 218 new complaints.
[552] *Ibid.* It inherited 15 complaints from the defunct Permanent Commission of Enquiry and received 90 new complaints.
[553] *Ibid.* at 199.
[554] *Ibid.* at 201.

are less empowered socially, economically, and politically compared to men; consequently, women's legal literacy and consciousness about their rights is low as compared to men.[555] Also, women sometimes fail to bring complaints before government institutions (including the TCHRGG) because of the poor enforcement of laws relating to women's human rights.[556] The TCHRGG 2001-2002 period also saw a very small number of *suo moto* investigations. This is due to the severely inadequate resources provided to the TCHRGG.[557]

The Dar es Salaam region received a total of 2,084 (or 65%) out of 3,206 complaints received on the mainland, the largest percentage of the total complaints received on the mainland. Other regions received considerably lower numbers of complaints due to the fact that some offices in rural regions are not easily reachable.

9. Accountability of the Commission for Human Rights and Good Governance

The Paris Principles do not address explicitly the issue of NHRI accountability. The UN notes that matters relating to NHRI reporting obligations involve disclosures of their finances and submission of public reports on their activities.[558] In practice, NHRIs are accountable to either the executive or legislative branch. In order to maximize NHRI independence it is, however, desirable and preferable that NHRIs be accountable to a legislature.[559] This can be done in two ways: either the legislature as a whole scrutinizes the NHRI's reports or a particular legislative committee examines

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[555] Mande Limbu, "Women and Higher Education in Tanzania" in Johanna Bond, ed., *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* (Durham: Carolina Academic Press, 2005) at 32. See also Regina M. Rweyemamu, "Judicial Activism and Gender Rights in Tanzania: The Task Ahead" in Johanna Bond, ed., *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* (Durham: Caroline Academic Press, 2005) at 67.
[556] Limbu, *ibid.* at 38.
[557] Tume ya Haki za Binadamu, *supra* note 437 at 199.
[558] *Handbook*, *supra* note 2 at 17, para. 137.
[559] *Ibid.*

the NHRI's reports. Also, the UN argues that NHRIs should be in some significant manner accountable to the general public.[560] The UN also insists that the characteristics of NHRI reports should be specifically provided in enabling legislation, including details such as: frequency of reports, (annual or biannual), the possibility of issuing *ad hoc* or special reports, matters to be reported, and criteria for examining the reports.[561]

The *Commission Act* holds the TCHRGG accountable to both the executive and the legislature. The law requires that the TCHRGG must submit financial reports of its revenues and expenditures to the legislature[562] and that, within six months of the end of a year, the TCHRGG should prepare and present its annual report to the legislature through the responsible Minister.[563] The law provides that the contents of the report should contain audited accounts of the TCHRGG's finances, including the auditor's report on those accounts, and that it should include an account of the operations of the TCHRGG.[564] The law also requires the TCHRGG to submit a copy of its annual report to the Presidents of Tanzania and Zanzibar.[565] Further, the law gives the TCHRGG authority to prepare and submit special reports on incidental matters to the responsible Minister.[566] The law leaves room for the TCHRGG to prepare and present such other reports as it deems fit but the TCHRGG shall only do so on the ground that

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[560] *Ibid.*, para. 138.
[561] *Ibid.*, para. 137.
[562] *Commission Act*, *supra* note 370, s. 30(1).
[563] *Ibid.*, s. 33(1).
[564] *Ibid.*, s. 33(1)(a)&(b).
[565] *Ibid.*, s. 33(2).
[566] *Ibid.*, s. 34.

the matter needs attention by one of the Presidents, a Minister, the legislature, or any other person or institution.[567]

This arrangement of the TCHRGG's accountability suggests that the TCHRGG is more answerable to the executive arm of the state than to the legislature. Arguably, this accountability essentially to the branch of government which is being scrutinized by the TCHRGG and which has a role in the appointment of TCHRGG members severely limits the TCHRGG's capacity for autonomy and independence. It would be a better arrangement if the TCHRGG accountability would be entrusted purely to the legislature.

10. Enforcement of the Commission for Human Rights and Good Governance Recommendations

It is important that NHRIs be legally empowered to make recommendations on the conclusion of the investigation of a complaint. Most importantly, the UN insists that NHRIs must be able to enforce their recommendations directly or by referring the matter to a court or tribunal.[568] In Africa, the record shows that most NHRIs have the power to issue recommendations or non-binding decisions and, at the same time, have no power to enforce their decisions.[569] While this is the case with the vast majority of NHRIs around the world, some NHRIs can refer their cases to human rights tribunals or courts for binding decisions.[570] The effect of denying NHRIs power to make referrals for binding decisions appears when respondents fail to comply with the NHRI's decisions–NHRIs can be demoralized, and their credibility and

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[567] *Ibid.*, s. 35.
[568] *Handbook, supra* note 2 at 34, para. 279.
[569] See Appendix I at 171.
[570] For example Canada, Ghana, Uganda, and Kenya.

performance can be adversely affected.[571] A better arrangement is legally to empower NHRIs to refer their cases to courts of law or to specialized human rights tribunals with the power to make binding decisions. This provides an effective mechanism for the ultimate enforcement of NHRI recommendations.

The TCHRGG can only make recommendations addressed to the respondent.[572] The TCHRGG has no general powers to enforce its own recommendations but, in the event that a respondent ignores its recommendations, and in the TCHRGG's opinion it is necessary to enforce its recommendations the TCHRGG has two options. It has the power to enforce its recommendations through bringing an action in a court of law in an attempt to get a court judgement to enforce the recommendations or it can advise the complainant to bring his/her own suit before any court.[573] In some cases, where the government refused to comply with TCHRGG recommendations, complainants have brought an action before the High Court of Tanzania seeking the implementation of the TCHRGG recommendation but the Court has declined to determine the matter for lack of jurisdiction.[574] To date, there is no information indicating that the TCHRGG has instituted any court proceedings or represented any complainants in court. The TCHRGG should be ready to use the power to bring an action in the courts of law, but only in appropriate cases. A good example of this is Ghana where the Commission on Human Rights and Administrative Justice has equivalent powers: in

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[571] *Handbook, supra* note 2 at 23, para.188.
[572] *Commission Act, supra* note 370, s. 17(1).
[573] *Ibid.*, ss. 15(3)& 28(3). See also *Administrative Justice Act, supra* note 370, s. 18(2); the *Constitution of Uganda*, 1995, *supra* note 374, Art. 53(3); and *South Africa Human Rights Act, supra* note 495, s. 7(1)(e).
[574] Keregero Keregero "Government Seeks More Time on Nyamuma Enquiry" *Guardian*, April 2, 2005, Joyce Mkinga "Human Rights Commission Says It's Toothless" *Guardian*, July 22, 2005, and Keregero Keregero, "Nyamuma Villagers Lose Case against the State" *Guardian*, October 6, 2005.

2000, Ghana's Commission handled over 21,000 cases and only 20 cases were filed in court for enforcement action.[575]

11. Conclusions

First, although the process of appointing TCHRGG members includes various individuals from different institutions, there are no representatives from opposition political parties who participate in the candidate screening process. Also, the process of appointment is directly controlled by the executive branch. As a result, more than half of the TCHRGG's members are political retirees of the ruling party who are likely to pay allegiance to the ruling party government.[576] Second, the TCHRGG law does not specify the exact number of commissioners and assistant commissioners to be selected.[577] The TCHRGG has noted the inadequacy of its staff size as a factor contributing to its ineffectiveness in operation.[578] Third, although the law provides for various professional qualifications for commissioners, it fails to prescribe professional qualifications for the vice chairperson and assistant commissioners.[579] Fourth, although the process for removing members of the TCHRGG rests in the hands of a special tribunal, the power to create the special tribunal rests with the President, who has the power to remove any commissioners by acting upon the recommendations of the special tribunal.[580] Fifth, the law provides for an initial tenure of three years for commissioners, and the law leaves open a possibility for reappointment for a second period. Also, commissioners are required to vacate previous public offices held prior

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[575] E. F. Short, "The Ombudsman in Ghana" in R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) at 214.
[576] Brocato, *supra* note 14 at 400.
[577] *Commission Act, supra* note 370, s. 7(1)(c) & (d).
[578] Tume ya Haki za Binadamu, *supra* note 437 at 199.
[579] *Commission Act, supra* note 370, s. 7(3).
[580] *Ibid.*, s. 10(2)(c).

to their appointments but the law is silent regarding commissioners who held private offices.[581] Sixth, although the law allows the TCHRGG to raise funds from different sources, the TCHRGG has no power to submit its own budget directly before the National Assembly. Rather, it is required to submit its budget estimates to the Minister of Justice and Constitutional Affairs for scrutiny and approval. Also, annual reports of the TCHRGG must be presented before the National Assembly; however, such reports have to be scrutinized by the Ministry of Justice and Constitutional Affairs before reaching the National Assembly.[582]

Although the law gives the TCHRGG broad mandates and powers, there are many limitations in the law which can negatively affect the operations and independence of the TCHRGG as noted above. It is also noted in this study that one of the factors affecting effective performance of the TCHRGG is a complete lack of adequate funds. This has resulted in very slow handling and conclusion of complaints, delays in preparing and publishing annual reports, inability to adequately address rural complaints, and extremely low numbers of *suo moto* investigations and complaints from women. Also, among those complaints dealt with and concluded in 2001-2002, the majority involved maladministration issues only.[583] Thus, the TCHRGG focuses more on its ombudsman element and less on its human rights protection mandate.

This chapter also notes that non-legal factors have negatively affected the effective performance of the TCHRGG. For example, the government plays a great role in politicizing and controlling the TCHRGG. As noted above, the government controls the operations of the TCHRGG at different levels, a majority of TCHRGG

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[581] *Ibid.*, s. 9.
[582] *Ibid.*, s. 33.
[583] Tume ya Haki za Binadamu, *supra* note 437 at 187-190.

members are former political leaders in the ruling party, and the government sometimes ignores some of the recommendations of the TCHRGG. Also, most TCHRGG operations are concentrated largely in big cities where the rural people have not been able to access effectively TCHRGG services.

As noted above, many of the limitations observed give powers to the executive branch to control many aspects of TCHRGG operations including appointment and removal of commissioners, control of funds, and investigations. I argue that the law governing the TCHRGG deviates from the Paris Principles in many respects.

However, although the TCHRGG issues non-binding decisions, its recommendations can be enforced in the courts.[584] This power to enforce its recommendations is a strength of the TCHRGG. However, this power remains unused to date, and the TCHRGG needs to have the courage to activate it in appropriate cases.

The next chapter will examine issues relating to appointment, termination of office, funding, mandates, powers, investigatory process, accountability, and the enforcement mechanisms of the SAHRC. These features will be examined in light of the legal framework governing the SAHRC and the Paris Principles.

[584] *Commission Act, supra* note 370, s. 28(3).

CHAPTER FIVE

SOUTH AFRICA HUMAN RIGHTS COMMISSION (SAHRC)

1. Background

Governmental rule in South Africa has had a long history of undemocratic practices and violations of basic rights and freedoms. In 1948, the National Party introduced the apartheid system which divided South Africans according to their races.[585] The policy introduced white supremacy and considered other races to be inferior to whites.[586] Under the apartheid regime, violations of basic rights and freedoms of the vast majority of the population were rampant.[587] The apartheid regime established a puppet body known as the Advocate-General in 1979 but, because of its jurisdictional limitations and scandals associated with it, in 1991 it was abolished and replaced by an ombudsman which operated until 1995.[588] The 1990s ushered South Africa into a new era of democratic administration. A culture of respect for and protection of human rights needed to be built in order to sustain the new democracy. Thus, the *1996 Constitution of South Africa* (hereinafter "*1996 Constitution*") included a Bill of Rights.[589]

The creation of the SAHRC was itself prompted by the circumstances that prevailed during the political transition to democratic rule. In this period, South Africa sought to develop a new constitutional order that would uphold democratic standards. The new government had to find means to end both coercive rule and human rights

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[585] A. J. Rycroft, & et. al., eds., *Race and the Law in South Africa* (Cape Town: Juta & Co, Ltd, 1987) at 4.
[586] Christof Heyns, ed., *Human Rights Law in Africa,* vol. 2 (Boston: Martinus Nijhoff Publishers, 2004) at 1507.
[587] Kamal, *supra* note 13 at 627.
[588] *Ombudsman*, *supra* note 8 at 237. See also S.A.M. Baqwa "South Africa's Ombudsman" in Kamal, *supra* note 13 at 640.
[589] *Constitution of South Africa of 1996*, No. 108 of 1996, chapter 2, [*Constitution of South Africa*].

abuses while, at the same time, ensuring that human rights became well protected and effectively promoted.

The intent to establish a HRC in South Africa is initially reflected in the 1993 *Interim Constitution* of South Africa, which made provisions for its formation.[590] Such provisions were meant to provide a clear indication that the new government was committed to reversing the past and to reassure all South Africans of the priority that would be given to human rights protection under the law.[591]

The SAHRC was established in 1995 by the terms of the 1994 *Human Rights Commission Act*[592] and, a year later, the *1996 Constitution* enshrined the SAHRC.[593] It also created other state institutions responsible for promoting and protecting human rights and democracy in South Africa. These institutions are independent of the government and cannot be controlled by either the current or future governments. In addition to the SAHRC, these institutions include the Public Protector (Ombudsman) and specialized institutions (known as "Chapter 9 institutions").[594]

As noted in the preceding chapter, the independence of an NHRI is significantly important to its performance. Where the independence of any NHRI is restricted, its performance and effectiveness are likely to be undermined. Taking cognizance of this fact, the Paris Principles and the UN have articulated the essential features needed to maintain the independence of NHRIs. As noted, the UN emphasizes such factors as adequate and continuous funding and control of budgets

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[590] *Interim Constitution of South Africa 1993*, No. 200, 1993, s. 115 [*Interim Constitution*].
[591] *Ibid.*, s. 116.
[592] *South Africa Human Rights Act, supra* note 495.
[593] *Constitution of South Africa, supra* note 589, s. 181(1).
[594] *Ibid.* The other "Chapter 9" institutions are the Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, and the Electoral Commission.

by NHRIs as a means to secure their independence.[595] It further insists that NHRIs should be enshrined in a legislative instrument, and appointment of members of NHRIs should be made in a manner that maintains independence of NHRIs.[596] Another facet that enhances the independence of NHRIs is the nature of the security of tenure and terms of conditions for members of NHRIs.[597] The Paris Principles also recommend that a suitable infrastructure should be adopted to enable NHRIs to obtain adequate funding for their operations free from government influence.[598] Also, the mandates and the appointment of NHRI members should be explicitly defined by law.[599]

As will be discussed further below, despite the provisions of the *1996 Constitution* and the 1994 *Human Rights Commission Act*, in practice, the SAHRC's independence from government influence remains incomplete.

2. Appointment of South Africa Human Rights Commission Members

A. Method of Appointment

The *1996 Constitution* provides for the method of appointment of the SAHRC. The names of candidates must first be submitted to a committee of the National Assembly which is constituted of representatives of all political parties having seats in the National Assembly.[600] The committee short-lists and interviews candidates and

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[595] *Handbook, supra* note 2 at 10, paras. 73-76.
[596] *Ibid.*, at 11, paras. 77-78.
[597] *Ibid.*, at 10 paras. 79-81.
[598] *Paris Principles, supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 2.
[599] *Ibid.*, para. 3.
[600] *Constitution of South, supra* note 589, s. 193(5)(a).

thereafter submits its recommendations to the National Assembly.[601] The National Assembly then must approve the proposed appointees by the adoption of a resolution supported by a simple majority vote.[602]

The first members of the SAHRC were appointed under the *1993 Interim Constitution* which provided that a resolution approving the names of candidates should be supported by a 75% majority of members of both the National Assembly and the Senate present during voting.[603] The *1996 Constitution* altered this provision, requiring only a simple majority in the National Assembly.[604] Comparatively, the former *1993 Interim Constitution*'s requirement for the support of three-quarters of National Assembly and Senate members present during voting is preferable because it resulted in greater levels of support by the legislature.

Also, while the *1996 Constitution* and the *1994 Human Rights Commission Act* provides for the involvement of civil society in the recommendation process, neither makes such involvement mandatory. This failure has exposed the SAHRC to criticism that its governing law limits the scope of diversity in the composition of the SAHRC members.[605]

After the National Assembly has approved the names of candidates, it forwards the names to the President who formally endorses the appointment of these candidates as commissioners.[606] Although the President is involved in the appointment process,

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[601] South Africa Human Rights Commission, *Workshop Manual: Building A Culture of Human Rights* (Cape Town: Institute of Criminology, 2000) at 24 [*Workshop Manual*]. See also Jeremy Sarkin, "Reviewing and Reformulating Appointment Processes to Constitutional Structures" (1999) 15 S.A.J.H.R. 587 at 587 [Sarkin].
[602] *Constitution of South Africa*, *supra* note 589, s. 193(5)(b) &(c)(ii).
[603] *Interim Constitution*, *supra* note 590, s. 115(3)(b).
[604] *Constitution of South Africa*, *supra* note 589, s. 193(5)(c)(ii)
[605] *Ibid.*, s. 193(6). See also Human Rights Watch, *supra* note 10 at 295.
[606] *Constitution of South Africa*, *supra* note 589, s. 193(4)(a).

his role is only a formality, while the National Assembly's role is central and the law emphasizes the strong legislative role in the appointment process.[607] While the 1993 *Interim Constitution* stated that the commissioners are responsible for electing the chairperson and deputy chairperson of the SAHRC from among themselves,[608] neither the *1996 Constitution* nor the 1994 *Human Rights Commission Act* makes specific provision for the selection of these positions. However, the *1996 Constitution* does state that the commissioners should broadly reflect the race and gender composition of South Africa.[609]

Also, the *1996 Constitution* requires that the committee responsible for the screening of candidates be composed of members from all political parties represented in the National Assembly.[610] The nature of representation envisaged in the *1996 Constitution* pays more attention to political parties, race, and gender than to professional and human rights expertise. Pursuant to the *1996 Constitution*, groups involved in the protection and promotion of human rights in South Africa are not involved in the selection process.

Despite the safeguards provided in both the *1996 Constitution* and the 1994 *Human Rights Commission Act*, there have been additional criticisms directed at the process of appointment of SAHRC members. First, political party affiliation plays a significant role in determining SAHRC's membership. Given this, there is a great

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[607] Reif, *supra* note 9 at 65.
[608] *Interim Constitution, supra* note 590, s. 115(5).
[609] *Constitution of South Africa, supra* note 589, s. 193(2).
[610] *Ibid.*, s. 193(5)(a).

probability that the joint committee will nominate candidates politically affiliated with individuals who have seats in the legislature.[611]

Second, the appointment of SAHRC members is primarily based on service already rendered via political involvement and performance rather than on potential professional contributions which the prospective candidates could make to SAHRC operations.[612] Since the SAHRC became operational there has been a high level of resignations of members, and some have contended that one of the reasons for this is due to differences between their interests in political activities and their commitment to human rights issues.[613]

In the Paris Principles, pluralistic representation is a paramount factor in the process of selecting NHRI members.[614] I argue that the process for selecting members of the SAHRC is not fully in line with the Paris Principles.

B. Composition of and Qualification of Commissioners

1. Composition

As noted in Chapter Four, the composition of a NHRI plays a significant role in determining the effectiveness and efficiency of the institution. Accordingly, the Paris Principles advocate for the importance of pluralism in the composition of NHRIs and in the selection of appointees. As such, the composition should represent social forces in the society.[615] In the same vein, the UN underscores that "...the composition of a national institution can be a further guarantee of its independence *vis-à-vis* the

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[611] Jeremy Sarkin, "The Development of a Human Rights Culture in South Africa" (1998) 20 Hum.Rts.Q. 628 at 650.
[612] Sarkin, *supra* note 601 at 594.
[613] *Ibid.* at 596. Three of seven commissioners resigned between 2001 and 2002.
[614] *Paris Principles*, *supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 1. First, they emphasize that the issue of pluralistic composition should be reflected in the body responsible for the process of appointing NHRI members. Second, the issue of pluralistic composition should be reflected in the members of the NHRI itself.
[615] *Ibid.*

public authorities and should reflect a degree of sociological and political pluralism. True pluralism requires the greatest diversity possible...".[616] Accordingly, for representation within NHRIs to be genuinely pluralistic, it should take into account the diversity and differential nature of the society in which it operates.

The *1993 Interim Constitution,* in what was perhaps an attempt to promote diversity, specifically provided that a HRC be composed of eleven members and that they reflect the nature of the South Africa community.[617] However, neither the *1996 Constitution* nor the 1994 *Human Rights Commission Act* provide for detailed provisions on the composition of the SAHRC. The *1996 Constitution* tends to confine the nature of the SAHRC's composition to matters relating only to race and gender.[618] In this regard, the *1996 Constitution* narrowly defines the characteristics of SAHRC members and the degree of their diversity and pluralism envisaged in the *1996 Constitution* does not genuinely represent the full nature of the South African community. In addition to running counter to the Paris Principles, this selectivity deviates from the spirit of the *1993 Interim Constitution.*[619]

2. Qualifications

In general, there are no specific qualifications required of NHRI members. The UN, however, insists that "...it is important that the recruitment and selection process be based on candidate profiles and be guided by established procedures...".[620] Thus, it seems advisable to establish specific qualifications for prospective candidates and to define methods for their selection. Such consideration comes into play especially

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[616] *Handbook, supra* note 2 at 12, para. 82.
[617] *Interim Constitution, supra* note 590, s. 115(1).
[618] *Constitution of South Africa, supra* note 589, s. 193(2).
[619] *Interim Constitution, supra* note 590, s. 115(1).
[620] *Handbook, supra* note 2 at 16, para. 128.

where the challenge of trying to obtain credible NHRI members is significant. The UN lists some of the qualifications which are closely related to human rights activities: a legal background, editing skills, experience in parliamentary drafting procedures, and analytical ability.[621] However, this list of qualifications is not exhaustive.

The Paris Principles provide that NHRIs should reflect in their composition, social forces in the society which are involved in the protection and promotion of human rights.[622] This being the case, experience in human rights efforts ought to be a significant qualification required of potential NHRI members.

Although the law does not provide for the professional qualifications required of SAHRC members, the *1996 Constitution* contains a number of provisions. First, aspirants can be of either gender.[623] Second, candidates must be citizens of South Africa.[624] Third, members of the SAHRC should be "...fit and proper persons to hold the particular office...".[625] Criteria to determine whether prospective candidates are fit and proper persons to hold the office are not specified. The *1996 Constitution* should provide such criteria. This could be done by clearly requiring certain professional qualifications or experience in human rights activities. John Hatchard also states that it is important that candidates for office in NHRIs must demonstrate political neutrality and be persons of high integrity.[626] Fourth, the *1996 Constitution* requires that SAHRC members be persons who "...comply with any requirements prescribed

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[621] *Ibid.*, para. 127.
[622] *Paris Principles*, *supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 1.
[623] *Constitution of South Africa*, *supra* note 589, s. 193(1).
[624] *Ibid.*, s. 193(1)(a).
[625] *Ibid.*, s. 193(1)(b).
[626] *Manual*, *supra* note 55 at 20.

by national legislation...".[627] The 1994 *Human Rights Commission Act* neither stipulates nor recommends which qualifications nominees should possess. The 1994 *Human Rights Commission Act* sets only terms and conditions for incumbent SAHRC members.[628]

Although the provisions on qualifications of potential SAHRC members are general, they do, however, have significant impact. First, they give wide discretionary powers to the appointing body and enable it to select persons it favours. Unhampered by specific constraints for selection, the appointing body has the power to apply any criteria to determine which persons are fit and proper to be SAHRC members. If the appointing body fails to appoint persons with adequate qualifications, the SAHRC is likely to become weak and ineffective. Should this occur, there is no legal basis to challenge these appointments. It would be preferable if either the *1996 Constitution* or the 1994 *Human Rights Commission Act* specifically outlines the qualifications for SAHRC members as this would provide a check on the discretionary powers of the appointing body of the SAHRC.

3. Termination of Office

In order to preserve the independence of NHRIs, it is important that the process and grounds for ending the service of their members be explicitly identified. John Hatchard argues that the grounds and procedural requirements for removing NHRI members should be clearly provided for in the relevant legal instruments.[629] The basic reason for doing so is to prevent the arbitrary removal of members.[630]

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[627] *Constitution of South Africa, supra* note 372, s. 193(1)(c).
[628] *South Africa Human Rights Act, supra* note 370, s. 3.
[629] *Manual, supra* note 55 at 25.
[630] *Ibid.*

Although the Paris Principles do not provide for any grounds or procedural requirements for termination of commissioners from office, they do, however, emphasize that the duration of tenure of office should be defined in the legislation.[631] The UN contends that "...it is generally accepted that senior officials of national institutions should be granted guaranteed, fixed-term appointments which are not of short duration...".[632] The UN also states that the authority to remove NHRI members ought to be vested in a legislature or other institution with a comparable level of authority.[633]

Under South African law, there are provisions that regulate the termination of office of SAHRC members. The services of SAHRC members can be terminated on five grounds. First, active service can end through formal resignation.[634] The record shows that a total of 3 (or 38%) out of 7 commissioners have resigned from the SAHRC.[635] Second, the service of SAHRC members can be terminated upon full completion of a prescribed term of office. Duration of service in the SAHRC ought not to exceed seven years.[636] Third, a SAHRC member can be removed from office upon proof of misconduct.[637] Although neither the *1996 Constitution* nor the 1994 *Human Rights Commission Act* define what circumstances or actions can amount to misconduct, the 1994 *Human Rights Commission Act* assigns the President the authority to determine the circumstances which might constitute misconduct.[638]

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[631] *Paris Principles*, *supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 3.
[632] *Handbook*, *supra* note 2 at 11, para. 79.
[633] *Ibid.*, para. 80.
[634] *South Africa Human Rights Act*, *supra* note 495, s. 3(4).
[635] South Africa Human Rights Commission, *6th Annual Report: April 2001 to March 2002* (Johannesburg: South Africa Human Rights Commission, 2003) at 53-54 [*6th Annual Report*].
[636] *South Africa Human Rights Act*, *supra* note 495, s. 3(1).
[637] *Constitution of South Africa*, *supra* note 589, s. 194(1) (a).
[638] *South Africa Human Rights Act*, *supra* note 495, s. 19(1)(i).

Fourth, SAHRC members can be removed from office after it has been proven that such a member has become incapacitated and unable to render service owing to poor health.[639] The President similarly determines the circumstances under which a SAHRC member is considered incapacitated.[640] Fifth, a SAHRC member can be removed from office if it is proven that such a member is incompetent to serve on the Commission.[641]

A better arrangement would give the National Assembly the power to determine all justifiable circumstances that can lead to rulings of misconduct, incapacity, and incompetence against SAHRC members. However, the current powers of the President to determine these circumstances are at least subject to a recommendation by the SAHRC and consultation with the Public Service Commission.[642] Therefore, it is expected that the powers of the President in this area will not directly undermine the independence of the SAHRC.

The 1994 *Human Rights Commission Act* provides the procedures to be followed to legitimately remove SAHRC members from office. For instance, for a resignation to be effective it must be in writing and submitted before the legislature three months prior to the effective date of resignation.[643] When removal of a member of the SAHRC takes the form of a motion for removal based upon the grounds provided in the *1996 Constitution*, a committee of the National Assembly is required to conduct an investigation into the matter and forward its findings to the National

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[639] *Constitution of South Africa*, *supra* note 589, s. 194(1)(a).
[640] *South Africa Human Rights Act*, *supra* note 495, s. 19(1)(i).
[641] *Constitution of South Africa*, *supra* note 589, s. 194(1)(a).
[642] *Ibid.*, s. 19(1).
[643] *Ibid.*, s. 3(4).

Assembly for deliberation and voting.[644] During such an investigation, the SAHRC member in question is suspended from office by the President.[645] The National Assembly is required to deliberate and adopt a resolution calling for the removal of the member involved.[646] The *1996 Constitution* requires that the resolution to remove a SAHRC member should be supported by a majority vote of National Assembly members.[647] However, the 1994 *Human Rights Commission Act* is inconsistent, requiring 75 percent support.[648] Further, it provides that the persons responsible for the deliberation and the vote should be members of the National Assembly or the Senate.[649] After the adoption of a resolution for removal, the President must then remove the SAHRC member in question from office.

Notwithstanding such inconsistencies in the law and the significant role given to the President in removing a SAHRC member from office, both the grounds and the procedural requirements for removal of SAHRC incumbents do seem to provide adequate safeguards against the arbitrary removal of members from office.

4. Remuneration and Tenure of Office

There is a strong connection, as it has been noted in the preceding chapter, between the independence of NHRIs and the issues of remuneration and tenure of office. Independence is strengthened by providing adequate remuneration and guaranteed terms of office for NHRI members in the NHRI's legal framework. Although the Paris Principles are silent on the issue of adequate remuneration of

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[644] *Constitution of South Africa, supra* note 589, s. 194(1)(b).
[645] *Ibid.*, s. 194(3).
[646] *Ibid.*, s. 194(1)(c).
[647] *Ibid.*, s. 194(2)(b).
[648] *South Africa Human Rights Act, supra* note 495, s. 3(1)(b).
[649] *Ibid.*

members of NHRIs, they do emphasize that adequate funding should be guaranteed to NHRIs sufficient to enable these institutions to have their own staff and premises and thus remain free from government influence.[650] Also, the Paris Principles emphasize that a specific period of tenure of members should be defined in a legal instrument.[651] The rationale is to ensure a stable mandate for and independence of NHRIs.[652]

In South Africa, the President determines the level of remuneration, allowances, benefits, and working terms and conditions for all SAHRC members.[653] However, the President is required to consult with Cabinet and the Minister of Finance.[654] The remuneration of SAHRC members cannot be reduced after having been determined.[655] In addition, the President is empowered to provide regulations regarding the categories of staff and scales of salaries for the different categories of personnel within the SAHRC.[656] In this regard, the SAHRC 2000-2001 annual report notes that:

> Of similar concern has been the manner in which members of the Commission continue to operate some five years since establishment without proper terms and conditions of employment. The prevailing arrangement is unsatisfactory in that it hardly differentiates commissioners from civil servants and there is no applicable code of employment for members of the Commission. So bizarre is this situation that commissioners [sic] salaries lag behind those of comparable civil service post designations and regularly, [sic] salary increments due to members of the Commission are rarely if ever paid on time. The net effect is that salaries of members of the Commission are not attractive and certainly lag far behind comparative positions in the civil service and the private sector...there is no framework for the determination of the salaries and conditions of service for members of the Commission. The result is that salaries for members of the

[650] *Paris Principles*, *supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 2.
[651] *Ibid.*, para. 3.
[652] *Ibid.*
[653] *South Africa Human Rights Act*, *supra* note 495, s. 13(1).
[654] *Ibid.*
[655] *Ibid.*, s. 13(2).
[656] *Ibid.*, s. 19(1)(a)(i).

> Commission are considerably less than what other Chapter 9 institutions receive.[657]

On the one hand, the 2000-2001 annual report indicates that SAHRC members operate under unfavourable conditions which are the result of an absence of proper guidelines for salary determination, and conditions and terms of employment. On the other hand, the SAHRC 1999-2000 annual budget indicates that 58% of the total budget was spent on salaries and wages for SAHRC members and other staff.[658] The present arrangement leaves all salary decisions with the executive branch with the result that the independence of the SAHRC is compromised and its effectiveness negatively affected.

However, the SAHRC determines the remuneration, allowances, and other benefits of its Chief Executive Officer.[659] The Chief Executive Officer in turn determines the salaries, allowances, and other benefits for other staff.[660] A better arrangement would be one that enables the National Assembly to determine the remuneration of SAHRC members.

The President is also empowered to determine the period of service for SAHRC members, although there is no definite period of service for SAHRC members cited in the 1994 *Human Rights Commission Act.* Rather, the law sets a ceiling of seven years, a maximum term of office which the President cannot exceed.[661] On the one hand, setting a ceiling of seven years can be seen to be

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[657] South Africa Human Rights Commission, *5th Annual Report: January 2000 to March 2001* (Johannesburg: South Africa Human Rights Commission, 2002) at 4 [*5th Annual Report*].
[658] South Africa Human Rights Commission, *4th Annual Report: December 1998 to December 1999* (Johannesburg: South Africa Human Rights Commission, 2000) at 20[*4th Annual Report*].
[659] *South Africa Human Rights Act, supra* note 495, s. 16(4).
[660] *Ibid.*, s. 16(5).
[661] *Ibid.*, s. 3(1).

advantageous, by giving the President an opportunity, at least in some circumstances, to offer relatively lengthy terms to SAHRC members. On the other hand, the failure to specify a definite duration of term may result in the allocation of shortened terms of service which can undermine the performance of the SAHRC. Accordingly, the legislature should set definite terms of office in the *1996 Constitution* or in the 1994 *Human Rights Commission Act* to avoid the arbitrary setting of service periods for SAHRC members.

5. Funding Sources for the South Africa Human Rights Commission

NHRIs should be able to draft and control their own budgets and to appropriate the funds allocated to them. The UN states that "...the source and nature of funding for a national institution should be specified in its founding legislation...",[662] and further notes that:

> Drafting of such provisions should be undertaken with a view to ensuring that the institution will be financially capable of performing its basic functions. An institution may, for example, be entrusted with responsibility for drafting its own annual budget which would then be submitted directly to parliament for approval...". [663]

First, setting such provisions in founding legislation is deemed important as it helps to ensure that the flow of funds is legally guaranteed.[664] Second, NHRIs should be given the right to draft their own budgets because when a NHRI budget is only a sub-budget within the budget of a larger government department, it is possible that the funds intended for the NHRI may be reduced or diverted to other areas. Thus, independent

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[662] *Handbook, supra* note 2 at 11, para. 74.
[663] *Ibid.*
[664] *Ibid.*

budgeting by NHRIs is one of the strategies to ensure they receive a constant and stable flow of funding.

Third, the UN places emphasis on NHRI funding being directly determined and endorsed by a legislature to ensure it has guaranteed funds and to further guarantee independence and impartiality. In order to ensure that NHRIs obtain continuing funding, the UN suggests that NHRIs maintain contacts with external institutions, as alternative, external sources for financial support.[665]

The Paris Principles also maintain that adequate funding should be guaranteed by law to enable NHRIs obtain adequate resources for their activities.[666] The Paris Principles appear to maintain that NHRI funding should not be within the powers of government departments, because this increases the possibility that NHRIs will lose their independence and impartiality.[667]

The main source of funding for the SAHRC is the National Assembly.[668] The SAHRC is required to submit its requests for funding as prescribed in the budgetary processes of national departments.[669] In practice, however, the SAHRC has been receiving monies allocated for its work from the Ministry of Justice and Constitutional Development.[670] This arrangement puts the SAHRC at odds with this Ministry and is contrary to the *1996 Constitution* which calls for state organs "...to ensure the independence, impartiality, dignity and effectiveness..." of the SAHRC.[671] However, the government of South Africa has in turn been insisting that money allocations to

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[665] *Handbook*, *supra* note 2 at 15, para. 124.
[666] *Paris Principles*, *supra* note 4, B. Composition and Guarantees of Independence and Pluralism, para. 2.
[667] *Ibid.*
[668] *South Africa Human Rights Act*, *supra* note 495, s. 16(3)(a).
[669] *Ibid.*
[670] Kamal, *supra* note 13 at 630.
[671] *Constitution of South Africa*, *supra* note 589, s. 181(3).

the SAHRC be done by and through the Ministry of Justice and Constitutional Development.[672]

Thus, the SAHRC does not have the power to submit its own budget directly to the National Assembly, but rather must pass it through a government department.[673] This deviates from the emphasis placed by the UN which insists on direct submission of the independent budget of a NHRI to a legislature.[674] The 1994 *Human Rights Commission Act* also does not provide for multi-sources of funding for the SAHRC. However, in practice, the SAHRC obtains funds from various internal and external sources.[675] Also, the SAHRC has been very innovative by creating strategies for raising funds for its operations. For example, it established the SAHRC trust fund in 1998 for independent funding from members of the public who are interested in assisting the SAHRC to fulfill its mandate.[676]

However, the main sponsor for the SAHRC is the government itself. The South African government should create legal provisions to allow the SAHRC to receive funding from other sources, rather than maintaining its dependence on government funds alone. Without the possibility of obtaining alternative sources of funding, a stable and constant flow of funds cannot be assured. Further, legal provisions should be introduced to enable the SAHRC to draft its own budget and forward it to the National Assembly. Having full control over its own funds would serve to strengthen the independence and impartiality of the SAHRC.

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[672] *Ibid.*
[673] *South Africa Human Rights Act, supra* note 495, s. 16(3)(a).
[674] *Handbook, supra* note 2 at 11, para. 74.
[675] *6th Annual Report, supra* note 635 at 72, Annexure A. Examples of internal sources of funds include: Department of Justice; Mott Foundation; Foundation for Human Rights; Vodacom; Bilton; Media; Land Bank; and Standard Bank Foundation. Examples of external sources of funds include: UNDP; European Union Foundation; Australian Aid; UNHCR; UNICEF; and Norwegian Institute for Human Rights.
[676] 4th Annual Report, *supra* note 658 at 26.

The *Public Finance Management Act*, 1999 poses another limitation on the SAHRC because it prevents the SAHRC from being able to borrow money, issue guarantees, and enter into any other commitments (such as renting property).[677]

The 2000-2001 SAHRC annual report notes that the:

> National Treasury purports to prescribe the Commission's priorities by simply withdrawing the relevant funding. Government has shown no willingness to discuss these matters in any effective manner with a view to finding solutions.[678]

However, after constant submissions by the SAHRC on the inadequacy of funds allocated for its operations, the government responded through the National Treasury by examining the SAHRC 2000-2001 budget and the National Treasury Team recommended an increase in budget baseline allocation from R16,763 million to R 20,721 million. Nevertheless, this recommendation was not implemented by the National Treasury.[679]

Alongside the existing inadequacy of allotted funds, the record shows that the SAHRC allocates more of its funds to administrative affairs rather than to its main projects. For instance, pursuant to the SAHRC 1999-2000 annual budget for main programmes, the SAHRC spent 64 percent of its total annual budget on administration and communication, and the remaining 36 percent was spent on the following programmes: education (8%), provinces (12%), legal services (9%), and research (7%).[680] The SAHRC 2000-2001 budget indicates that the total expenditure distribution for standard items was as follows: projects (22%), personnel (45%),

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[677] *Public Finance Management Act*, 1999, s. 66.
[678] 5th *Annual Report*, *supra* note 657 at 3-4.
[679] *Ibid.* at 11.
[680] 4th *Annual Report*, *supra* note 658 at 20.

administration (16%), equipment (3%), and rent (14%).[681] The same budget indicates that the total expenditure distribution for main programmes of the SAHRC was as follows: provinces (14%), training (4%), research (8%), legal services (7%), advocacy (7%), commissioners (29%), and management (31%).[682] Based on budgets over two years, one can argue that the shortage of funds for the main projects of the SAHRC is partly caused by poor distribution of funds within the SAHRC itself.

6. Mandates of the South Africa Human Rights Commission

The Paris Principles, as stated in Chapter Four, emphasize that the mandates of NHRIs should be clearly defined in a legal instrument and should be as broad as possible.[683] The *1996 Constitution* states that the mandates of the SAHRC are to:

> (a) promote respect for human rights and a culture of human rights;
> (b) promote the protection, development and attainment of human rights; and
> (c) monitor and assess the observance of human rights in the Republic.[684]

In addition to the above functions, the SAHRC is entrusted with the investigation function.[685] The *1996 Constitution* also requires relevant organs of the state to produce annually for the SAHRC information on the measures taken by these state organs towards the realization of the range of human rights provided for in the Bill of Rights, including housing, healthcare, food, water, social security, education, and the environment.[686] The 1994 *Human Rights Commission Act* gives the SAHRC

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[681] *Ibid.* at 11-12.
[682] *Ibid.*
[683] *Paris Principles*, *supra* note 4, A. Competence and Responsibilities, para. 2.
[684] *Constitution of South Africa*, *supra* note 589, s. 184(1).
[685] *South Africa Human Rights Act*, *supra* note 495, s. 9(1). The implementation of this function will be addressed, *infra* subsection 7.
[686] *Ibid.*, s. 184(3).

additional mandates.[687] However, in practice, the SAHRC has restricted its activities to a narrower range of functions than those provided for in the *1996 Constitution* and the 1994 Human *Rights Commission Act*.[688] It is argued that this is due to the fact that the SAHRC tries to avoid overlapping of jurisdictions with similar bodies established by the *1996 Constitution*.[689] Its focus on a limited range of human rights issues has resulted in the SAHRC being criticized for looking to "...softer human rights and ignoring core, major and difficult human rights issues with major relevance for South Africa...".[690] It has been argued that the SAHRC should re-prioritize its human rights operations to focus on more pressing human rights issues.[691] The SAHRC is moving in this direction. For example, in 1999 the SAHRC focused on racism and racial discrimination for its main projects.[692]

7. Powers of the South Africa Human Rights Commission

NHRIs require adequate powers to enable them to perform their work effectively. The UN suggests that the powers accorded to NHRIs should be entrenched in legal instruments.[693] The UN further notes that the powers accorded to NHRIs should not be excessive: excessive powers might be more damaging than insufficient powers. NHRIs should be granted adequate powers sufficient to enable them to fulfill their responsibilities.[694] There should not be unnecessary restrictions on investigations by NHRIs relating to specific areas of human rights or types of

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[687] *South Africa Human Rights Act, supra* note 495, s. 7(1).
[688] Human Rights Watch, *supra* note 10 at 294.
[689] *Ibid.*
[690] Jeremy Sarkin and William Binchy, eds., *Human Rights: the Citizen and the State: South African and Irish Perspectives* (Dublin: Round Hall Sweet & Maxwell, 2001) at 32.
[691] *Ibid.*
[692] *4th Annual Report, supra* note 658 at 9.
[693] *Handbook, supra* note 2 at 13, para. 95.
[694] *Ibid.*, para. 96.

individuals.[695] The power to investigate human rights cases in both the private and public sectors is typically given to most NHRIs.[696]

The powers of the SAHRC are enshrined in the *1996 Constitution* which vests the SAHRC with those powers necessary to perform its functions, including the powers of: investigating and reporting on the observance of human rights, taking steps to secure appropriate redress where human rights have been violated, carrying out research, and educating the public on human rights issues.[697] Although the power to investigate human rights violations in both the private and public sectors is not explicitly provided for in either *the 1996 Constitution* or the 1994 *Human Rights Commission Act*, there are implied powers to deal with investigations in both sectors.[698]

Regarding SAHRC powers there are two features which are particularly important for its effective performance. First, the powers granted to the SAHRC are broad enough to enable it carry out its functions effectively. Second, the powers granted to the SAHRC to investigate human rights violations are not limited in any way which would prove detrimental to its successful performance.

In order to ensure that the SAHRC exercises its powers without any influence, the *1996 Constitution* shields the SAHRC by stipulating clearly that state organs should ensure that the SAHRC's independence, dignity, impartiality, and effectiveness are maintained.[699] Also, the 1994 *Human Rights Commission Act*

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[695] *Manual*, *supra* note 55 at 61.
[696] *Ibid.* at 63. Unlike traditional ombudsman, national human rights commissions have the powers to investigate human rights complaints in both private and public sectors.
[697] *Constitution of South Africa*, *supra* note 589, s. 184(2).
[698] *Ibid.*
[699] *Ibid.*, s. 181(3).

supports the SAHRC's independence, such as by requiring SAHRC members to perform their duties and functions without fear, favour, bias, or prejudice.[700] Further, it precludes the interference by any organ of state or government employees in the SAHRC's activities.[701] The Act calls upon state organs to provide such assistance to the SAHRC to ensure that the SAHRC maintains its independence, impartiality, and dignity.[702] It also precludes SAHRC members from engaging in any investigations or assisting in any findings in which they have vested interests.[703] Further, the Act provides that if any SAHRC member fails to disclose whether he or she has vested interests in a complaint to be investigated and proceeds with an investigation, once it is discovered that such a member has such vested interests, the SAHRC is authorized to take necessary measures in order to ensure that a fair, unbiased, and proper investigation is conducted.[704]

The 1994 *Human Rights Commission Act* provides that the SAHRC may "...conduct or cause to be conducted any investigation...".[705] In practice, the SAHRC has dealt with various projects since its inception. Its complaint handling power and the nature of complaints investigated touches on various aspects of the Bill of Rights.[706] Between 1998-1999, the SAHRC annual report indicates that the majority of complaints received by the SAHRC concerned equality issues; however, the annual

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[700] *South Africa Human Rights Act*, *supra* note 495, s. 4(1).
[701] *Ibid.*, s. 4(2)
[702] *Ibid.*, s. 4(3).
[703] *Ibid.*, s. 4(4).
[704] *Ibid.*, s. 4(5).
[705] *Ibid.*, s. 9(1) (a). See also *Constitution of South Africa*, *supra* note 589, s. 184(2)(a).
[706] *6th Annual Report*, *supra* note 635 at 24.

report does not present the comprehensive number of complaints handled in all seven regions of South Africa.[707]

Between 2000 and 2001, the SAHRC received a total of 6,265 complaints: 7% of the complaints involved refugees, 12% of the complaints concerned freedom and security of the person, 32% of the complaints concerned equality issues, 9% of the complaints involved health care issues, 8% of the complaints concerned administrative action, 10% of the complaints concerned access to court, 12% of the complaints concerned education issues, and 10% of the complaints concerned labour relations.[708] Between 2001 and 2002, the SAHRC received a total of 3,001 complaints although 1,395 complaints (or 46%) did not fall within its jurisdiction.[709] The majority of complaints—1606 (or 54%)—concerned: equality (8%), inadmissible complaints (11%), labour relations (6%), administrative action (5%), complaints which needed more information from complainants (8%), arrested and detained persons (3%), human dignity (3%), freedom and security of the person (3%), access to court (2%), access to information (1%), and various areas of the Bill of Rights (4%).[710]

Based on the annual reports, equality issues are the most common basis of complaints to the SAHRC. Also, there is a large fluctuation in the number of complaints received by the SAHRC from year to year. However, there is no information which explains the reason for this fluctuation.

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[707] *4th Annual Report, supra* note 658 at 42-53. Other types of complaints received by the SAHRC include: issues concerning access to medical services; access to court; access to information; freedom and security of the person; freedom of expression; freedom of sexual orientation; privacy; discrimination in schools; prison cases; and freedom of movement.

[708] *5th Annual Report, supra* note 657 at 14.

[709] *6th Annual Report, supra* note 635 at 24.

[710] *Ibid.* Other types of complaints dealt with by the SAHRC between 2001 and 2002 include: complaints regarding privacy; political rights; freedom of association; environment; property; freedom of expression; housing; language; and culture.

However, it is not clear whether or not the SAHRC has the power to launch *suo moto* investigations. The SAHRC has the power to engage in mediation, conciliation, or negotiation for resolving disputes or rendering redress for the violation or threat of any basic rights.[711] The SAHRC can subpoena any person to attend and furnish information relevant for the determination of any complaints.[712] The SAHRC has the power to enter, inspect, seize, and conduct searches in any premises or examine any article or document found therein.[713]

The SAHRC also has the power to institute a suit in a court of law or tribunal "...on its own name, or on behalf of a person, or a group or class of persons...".[714] In order to promote effective redress for victims of human rights violations, the SAHRC has been instituting cases in courts or tribunals; however, there is no comprehensive data which specify the nature and number of cases which the SAHRC has filed in courts or tribunals.[715]

The SAHRC can conduct research on any fundamental rights and provide recommendations regarding such findings.[716] In practice, the record indicates that the SAHRC has been conducting various studies regarding fundamental rights.[717]

The SAHRC also has been assessing and monitoring "... whether legislative, policy and programmatic measures adopted by organs of state are reasonable, that the programmes and projects are comprehensive and cater for vulnerable groups...".[718]

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[711] *South Africa Human Rights Act, ibid.*, s. 8.
[712] *Ibid.*, s. 9(1)(b)(c).
[713] *South Africa Human Rights Act, ibid.*, s. 10(3).
[714] *Ibid.*, s. 7(1)(c).
[715] *6th Annual Report, supra* note 635 at 22.
[716] *Ibid.*, s. 7(1)(d). See also *Constitution of South Africa, supra* note 589, s. 184(2)(c).
[717] *5th Annual Report, supra* note 657 at 1.
[718] South Africa Human Rights Commission, *4th Economic and Social Rights Report: Overview-April 2000-March 2002* (Johannesburg: South Africa Human Rights Commission, 2003) at 17.

Throughout its operations, the SAHRC has been assessing the general realization of various social and economic rights such as the rights to: education, housing, health care, food, water, social security, and a clean environment.[719]

Every year the SAHRC issues protocols to relevant authorities requiring them to furnish information regarding the measures they have taken towards realization of basic rights as prescribed in the *1996 Constitution*.[720] However, the method used by the SAHRC to monitor and assess the realization of socio-economic rights has weaknesses because the SAHRC relies heavily on the reports from national and provincial governments. These reports have been seen to be inadequate for various reasons including lack of sufficient and appropriate information.[721] In its reports, the SAHRC does not provide clear statistics. Rather, it provides general observations regarding legislation, policy, and programmes adopted by each government department. The SAHRC has already issued about five annual reports on the implementation of social and economic rights.[722]

The SAHRC has been conducting public inquiries into various cases including Racism and Racial Discrimination in the Department of Justice and Constitutional Development; Faultiness: Inquiry into Racism in the Media, Road Closures and Related Measures; Human Rights Violations in Khomani San Community; and Human Rights Violations in Farming Communities.[723] Further, the SAHRC has been involved in human rights promotion, and human rights education and advocacy, such

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[719] *Constitution of South Africa, supra* note 589, ss. 24-27, and 29.
[720] *Ibid.*, s. 184(3).
[721] South Africa Human Rights Commission, *4th Economic and Social Rights Report: Executive Summary* (Johannesburg: South Africa Human Rights Commission, 2002) at 23.
[722] *Reports, supra* note 697.
[723] South Africa Human Rights Commission, online: SAHRC Reports <http://www.sahrc.org.za/sahrc_cms/public/cat_index_41.shtml > [*Reports*][last visited November 24, 2005].

as launching a variety of human rights awareness programmes including workshops and training on human rights to leaders of provincial and national governments, NGOs representatives, and various campaigns for media members and the general public.[724]

8. South Africa Human Rights Commission Investigation Process

Two concerns arise when NHRIs are dealing with human rights complaints. First, it is important to identify explicitly the manner in which such cases are received and processed, including grounds of admissibility and the rules of procedure to be followed. Second, the eligibility of individuals to lodge complaints with NHRIs is an issue.

The Paris Principles suggest that complainants can be "...individuals or their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations...".[725] In view of this, it is obvious that the Paris Principles encourage the eligibility of different categories of persons as complainants. The UN emphasizes that NHRIs should have procedural rules which regulate the institution of complaints and the conduct of proceedings.[726] Further, the procedural rules should be explicitly and formally enshrined in a legal instrument.[727] The criteria for the admissibility of complaints should be embedded and clearly defined, especially the object and the nature of admissible complaints.[728] In establishing the rules of procedure, it is indispensable that restrictions either on object

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[724] *6th Annual Report*, *supra* note 635 at 28. See also *5th Annual Report*, *supra* note 657 at 2-12.
[725] *Paris Principles*, *supra* note 2, D. Additional Principles Concerning the Status of Commissions with Quasi-jurisdictional Competence, para.1.
[726] *Handbook*, *supra* note 2 at 28, para. 221.
[727] *Ibid.*
[728] *Ibid.*, para. 222.

or subject matter not prevent NHRIs from fulfilling the activities for which they were created.[729]

Unfortunately, neither the *1996 Constitution* nor the 1994 *Human Rights Commission Act* provides for the rules of procedure which would regulate the filing of complaints with the SAHRC and the proceedings to deal with complaints. In the absence of established rules of procedure to guide the SAHRC on admissibility of complaints and in the conduct of proceedings, the law requires the SAHRC to adopt *ad hoc* rules of procedure to govern investigations and the adoption of such rules is followed by a requirement to publish the rules in the Gazette.[730] However, such rules could be detrimental or inappropriate for some complainants under certain situations. For instance, if there are no established criteria for admissibility of complaints, the SAHRC may dismiss certain complaints on arbitrary grounds. Therefore, it is indispensable for the SAHRC to have clearly established rules for admissibility of complaints and rules of procedure.

9. Accountability of the South Africa Human Rights Commission

Accountability of NHRIs is one of the features which directly impact the effective performance of NHRIs. Accountability includes issues related to the submission of financial accounts and reports by the NHRIs.[731] The Paris Principles provide that one of the responsibilities of NHRIs is to prepare reports which can be presented to the government, legislature, or any other competent institution.[732] Reports by NHRIs should be general in their scope and others can be on specific

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[729] *Handbook, supra* note 2 at 16, para. 229.
[730] *South Africa Human Rights Act, supra* note 495, s. 9(6)-(7).
[731] *Handbook, supra* note 2 at 17, para. 137.
[732] *Paris Principles, supra note* 4, A. Competence and Responsibilities, para. 3(a)(i).

issues.[733] The UN also insists that reporting requirements should be embedded in the founding legislation and be as detailed as possible in stipulating the frequency of reports, matters to be reported on, manner of determining the reports, and the possibility of submitting *ad hoc* reports on specific issues.[734] Also, the UN requires that NHRIs be accountable to their clientele and to the general public.[735]

The *1996 Constitution* provides that the SAHRC should be accountable to the National Assembly, and the SAHRC must submit its reports on its activities and on the performance of its functions to the National Assembly at least annually.[736] However, the 1994 *Human Rights Commission Act* increases this to four times in a year.[737] It is clear from this provision that the SAHRC is accountable to the National Assembly. The 1994 *Human Rights Commission* Act provides a number of entities to which the SAHRC is accountable. The SAHRC is accountable to the general public; the SAHRC is tasked with distributing its reports of findings and its recommendations to any person as the SAHRC deems fit.[738] However, reports of its investigations, particularly of serious cases, are distributed only as the SAHRC deems necessary.[739] The SAHRC is accountable to the legislature and is required by law to submit to the legislature quarterly reports of serious cases if it deems appropriate to do so. Quarterly reports are also required to be presented to the President. The SAHRC is accountable to the parties involved in the case: it is authorized to provide a report of the

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[733] *Ibid.*, para. 3(a)(iii).
[734] *Handbook*, *supra* note 2 at 17, para. 137.
[735] *Ibid.*, para. 138.
[736] *Constitution of South Africa*, *supra* note 589, s. 181(5).
[737] *South Africa Human Rights Act*, *supra* note 495, s. 15(2).
[738] *Ibid.*, s. 15(1).
[739] *Ibid.*, s. 15(2).

investigation to the parties involved. However, in practice, the SAHRC provides such reports to the parties when it deems fit.[740]

Over its 10 years of operations, the SAHRC has already issued three types of reports: three annual reports, various *ad hoc* reports, and five annual reports for the implementation of socio-economic rights.[741] Clearly, the SAHRC has been very slow in the preparation and publication of its annual reports. For instance, the latest annual report available is that of 2001-2002.[742]

With respect to financial accounts, the *1996 Constitution* states that the SAHRC through its chief executive officer has a responsibility to provide its financial accounts.[743] Although the governing legislation does not stipulate whether the SAHRC is directly accountable to the National Assembly, in practice the SAHRC submits its financial accounts to the National Assembly through the Ministry of Justice and Constitutional Development.[744] In fulfilling this responsibility, the SAHRC attaches sections on financial accounts in its annual reports.[745]

10. Enforcement of South Africa Human Rights Commission Recommendations

In most instances, NHRIs render non-binding decisions.[746] The legal implication of non-binding decisions is that when the recommendations are ignored, then the chances are relatively small of enforcing such recommendations through legal action in the courts. Recommendations by NHRIs should contain items of

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[740] *Ibid.*, s. 15(3).
[741] South Africa Human Rights Commission, online: publications <http://www.sahrc.org.za/sahrc_cms/publish/cat_index_47.shtml> [last visited November 24, 2005].
[742] *Ibid.*
[743] *South Africa Human Rights Act, supra* note 495, s. 16(1)(c)(i).
[744] *Performance & legitimacy, supra* note 147 at 70.
[745] *6th Annual Report, supra* note 635 at 65. See also *5th Annual Report, supra* note 657 at 62. See also *4th Annual Report, supra* note 658 at 18.
[746] Kamal, *supra* note 13 at 162.

substance–either proposals for amendment or reform of laws, regulations, or administrative practices.[747] The UN maintains that NHRIs can have "...the power to make legally enforceable orders and binding decisions...".[748] The importance of making the recommendations of NHRIs legally enforceable is that it invigorates the efforts and performance of NHRIs.[749] As described in Chapter Four, there are a few countries whose NHRIs have the powers to apply for a court's intervention in order to enforce their recommendations, while others are able to institute criminal proceedings *suo moto* or to ask the victim(s) to commence a legal action in a court of law or tribunal.[750]

There are no explicit provisions regulating the enforceability of the SAHRC's recommendations. In such an absence, it may be presumed to mean that the SAHRC recommendations are non-binding since most NHRIs cannot make binding recommendations. Nonetheless, the law provides that in addition to other powers, duties, and functions given to the SAHRC, it has the power to institute legal actions in a court of law or a tribunal in its own name or by way of representing an individual or a group or class of persons.[751] This provision is still ambiguous since it does not specify clearly whether the SAHRC can institute legal action for the purpose of enforcing its recommendations. There is not any case law which resolves this ambiguity. The inclusion of explicit provisions on the enforceability of SAHRC recommendations would better enable the effective performance of the SAHRC.

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[747] *Paris Principles, supra* note 4, D. Additional Principles Concerning the Status of Commissions with Quasi-jurisdictional Competence, para. 4.
[748] *Handbook, supra* note 2 at 34, para. 279.
[749] *Ibid.*
[750] Kamal, *supra* note 13 at 162.
[751] *South Africa Human Rights Act, supra* note 495, s. 7(1)(e).

11. Conclusions

From the preceding discussion, the following are the strengths and weaknesses of the SAHRC legal framework. First, the process of appointment of SAHRC members is controlled by the legislature, specifically the National Assembly—and political representation takes precedence over other strata in society.[752] There is a minimal role for the executive branch in the process of appointments and this only occurs when the President makes the formal appointment of commissioners. The small role of the executive branch in the appointment process of SAHRC members increases the level of independence of the SAHRC.

Second, the law refers to the composition of the SAHRC only in matters relating to gender and race. The law does not require any professional qualifications of prospective candidates who aspire to be SAHRC members. On the one hand, this scenario leaves a bigger range of choices for prospective candidates to be selected for positions in the SAHRC. One the other hand, the same scenario leaves it open for appointment of unqualified members.

Third, the process of removing SAHRC members rests with the National Assembly and the Senate and the law also prescribes several safeguards against arbitrary removal of commissioners from office.[753] Thus, the legislature controls the process of removal of SAHRC members and this increases the degree of SAHRC independence because SAHRC members are confident that they cannot be removed from office arbitrarily. However, the President is responsible for determining salaries of commissioners, providing guidelines for conditions of service, and determining the

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[752] *Ibid.*, s. 193 (5)(a)

[753] *Constitution of South Africa, supra* note 589, s. 181(3). See also *South Africa Human Rights Act, ibid.*, s. 4.

period of tenure for commissioners.[754] This study shows that until 2002 there was not a framework in place for determining salaries and conditions of service.

Fourth, the main source of funding for the SAHRC comes from the National Assembly via the Ministry of Justice and Constitutional Development. The SAHRC has developed some strategies for raising its own funds instead of depending solely on government and donors' funds.[755] However, a shortage of funds is still a problem for the SAHRC. The present arrangement also requires the SAHRC to receive its funds allocation from the Ministry of Justice and Constitutional Development.[756] This reduces the independence of the SAHRC and thus affects its operations. There has also been a serious problem with funds allocation from the Ministry of Justice and Constitutional Development. The SAHRC constantly complains about poor assessment of SAHRC operations and reduced funds allocations from the responsible Ministry.[757] However, this study has also observed that the SAHRC spends a great percentage of its funds on administrative affairs rather than its main projects, an indication that there is poor internal management of funds in the SAHRC.

Fifth, the SAHRC has broad mandates and powers. However, in practice, it has restricted its functions to a narrower range. Due to the fact that the SAHRC has broad mandates which do not correspond with the available resources, then the approach of focusing on narrower range of functions is preferable. Although the SAHRC has the power to conduct investigations, the law does not provide any rules of procedure for conducting its proceedings. Rather, it permits the SAHRC to establish *ad hoc* rules of

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[754] *South Africa Human Rights Act, ibid., ss.* 3(1) & 13(1).
[755] *4th Annual Report, supra* note 658 at 26.
[756] *South Africa Human Rights Act, supra* note 495, s. 16(3)(a).
[757] *5th Annual Report, supra* note 657 at 3-4.

procedure.[758] Failure to provide established rules of procedure can lead to arbitrary, biased, and unpredictable decisions.

Sixth, the SAHRC is accountable directly both to the National Assembly and the President. However, its financial reports have to be presented before the National Assembly through the Ministry of Justice and Constitutional Development like government departments.[759] This latter arrangement can have a negative impact on SAHRC independence especially as the responsible Ministry has reduced the budget for SAHRC operations.

Seventh, the SAHRC issues non-binding recommendations only. In the event that any respondent ignores its recommendations, the SAHRC has no explicit power to enforce its recommendations. The only option it has is to commence a legal action in the courts of law.[760] However, based on this research, this does not appear to have occurred yet.

This chapter concludes that, in many respects, the law governing the SAHRC complies with the Paris Principles. While there are some aspects of the SAHRC's legal framework that are substandard in light of the Paris Principles, I argue that they are unlikely materially to affect the SAHRC's independence.

This thesis also argues that non-legal factors influence the effectiveness of a NHRI. In South Africa, most non-legal factors have positively contributed to effective SAHRC performance. For example, the SAHRC has actively been using mass the media for its operations. The record shows there are good relations between the

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[758] *Ibid.*, s. 9(6).
[759] *Ibid.*, s. 16(3)(a).
[760] *Ibid.*, s. 7(1)(e).

SAHRC and human rights NGOs. There is not too much control over the activities of the SAHRC by the government and the SAHRC is not politicized.

Other non-legal factors have negatively affected the operations of the SAHRC. For example, the lack of adequate resources has caused the SAHRC to fail to establish provincial offices and thus is not able to reach some rural places. Lack of adequate resources has caused the SAHRC to be slow in preparing and issuing annual reports. Inadequate resources have caused the SAHRC to narrow its range of functions and focus only on certain areas of human rights.

CHAPTER SIX

GENERAL CONCLUSIONS AND RECOMMENDATIONS

1. General Conclusions

Human rights cannot be realized in the absence of effective and accountable institutions. The future of human rights protection and promotion depends, to a large extent, on whether countries are successful in building their own NHRIs to ensure effective protection and promotion of human rights at the national level. If NHRIs are adequately resourced, suitably accessible to the people, grounded in supportive regulatory frameworks, and relevant non-legal factors are addressed, they can improve their performance in the domestic protection and promotion of human rights.

The main focus of this thesis has been on reviewing regulatory frameworks governing the TCHRGG and SAHRC based on the UN's Paris Principles. The review of these regulatory schemes has been done with the objective of highlighting, first, the vivifying features which invigorate the effective performance of both the TCHRGG and SAHRC which governments with similar bodies elsewhere in Africa might adopt. Second, the review sought to draw out some weaker features of the two NHRIs which legal reforms might serve to correct and increase the effectiveness of both the TCHRGG and SAHRC.

This thesis has examined the UN structure of human rights protection and promotion and concludes that the UN system is crowded with inherent restrictions which hinder effective redress for individual victims at the international level. Thus, the establishment and strengthening of NHRIs can best provide effective redress for

individuals at the domestic level.[761] Also, the thesis traces the genesis and development of NHRIs in the UN system and concludes that the active involvement of the UN in advocating for the establishment and strengthening of NHRIs stems from UN conviction that effective protection and promotion of human rights can be ensured effectively by independent NHRIs at the national level.[762] While some UN bodies started to discuss the importance of NHRIs and advocate for their establishment in 1946,[763] the UN supported the establishment of NHRIs through the adoption of the Paris Principles in the early 1990s which provide fundamental standards for NHRIs. Also, the UN continues to support NHRIs through provision of technical and financial support to various governments.

This thesis examines and presents a synopsis of NHRIs in Africa. In tracing the evolution of these bodies in Africa, the thesis found that there are a variety of HRCs, HHRO, and other types of ombudsman offices in Africa. The mandates of each vary from institution to institution. While some have broad mandates, others have limited and/or narrow mandates.[764] The thesis also turned to those other stakeholders, especially states and international donors, whose financial and technical support augmented the development of NHRIs in Africa. In light of the analysis emerging from the available statistics, this thesis concludes with the following general observations.

First, most of the legal frameworks of NHRIs in Africa contain numerous limiting features which serve as potential counters to the effective performance of

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[761] *Human Rights Today*, *supra* note 56 at 27.
[762] *Handbook*, *supra* note 2 at 36, para. 299.
[763] *Ibid.* at 4, para. 21.
[764] *Ombudsman*, *supra* note 8 at 224.

these institutions. However, a few of the legislative frameworks have features which, if adopted by other states in Africa, can notably enhance the operative strength of their NHRIs. In particular, NHRIs in South Africa, Ghana, Ethiopia, Kenya, and Uganda exhibit strong legislative provisions which enhance the independence and effectiveness of the institution.

A second finding is that most NHRIs in Africa are accountable to the executive branch, which has negative implications for institutional independence. However, a few are answerable to their legislatures especially those NHRIs in South Africa, Ghana, Ethiopia, Kenya, and Uganda.

A third observation is that most NHRIs in Africa have powers of investigation in their legislative structures. However, their powers of investigation are often restricted and also negatively influenced by executive branch control. Funding as a form of operational control is primarily in the hands of national governments, in particular the executive branch, and, also, external donors do have influence on funding. It is observed that a heavy reliance on technical and financial support from donors, together with complications accompanying donor support, has negatively affected these institutions. It is also argued that some of the legislative structures are silent on the issue of funding, and most NHRIs in Africa do not have the legal mandate to draft their own budget and forward it directly to the country's legislature. This thesis found that many NHRIs in Africa are under-funded and this affects negatively their activities and effectiveness.[765]

The fourth argument developed in this study concerns the nature of decisions NHRIs in Africa can make. The vast majority of NHRIs have the power to issue non-

[765] Human Rights Watch, *supra* note 10 at 21.

binding recommendations and most of them have no enforcement mechanisms to ensure compliance with their recommendations.

In conclusion, this thesis has found that NHRIs in Africa without strong legal frameworks based on the Paris Principles are weak and ineffective in the protection and promotion of human rights. Thus, there is need for legislative reform of those provisions which undermine the effectiveness of NHRIs in Africa.

Apart from having weak legal frameworks, this thesis also found that non-legal factors have influence on the effectiveness of NHRIs in Africa. These factors include: the character of incumbents, relations with the media, relations with human rights NGOs and civil society groups, the attitude and responsiveness of government to the NHRI, and the general public perception of the NHRI's work. Each factor influences the effectiveness of a NHRI differently.

The thesis also focuses on a critical analysis of the regulatory frameworks of Tanzania and South Africa. While Tanzania was the first country to create an ombudsman office in Africa, it changed from a traditional ombudsman model to a HHRO in 2000. The legal framework of the current TCHRGG, however, requires a number of amendments in order to improve its effectiveness. This thesis demonstrates that, despite the existence of some strong provisions in the legal framework governing the TCHRGG, other weak aspects already have negatively affected the effective performance of the TCHRGG and may also undermine the independence of the TCHRGG in the coming years. I argue that there is excessive executive branch control over the TCHRGG and, thus, the TCHRGG can only be effective if it is given greater independence from the executive branch in matters relating to appointments,

accountability, and investigations.[766] This requirement is essential because, without it, the TCHRGG will become a mere façade institution. Gauged against the standards of the Paris Principles, its legal framework deviates from the spirit of the Paris Principles in many aspects.

With respect to South Africa, I also demonstrate that the legal framework governing the SAHRC has various provisions which invigorate its effective performance and make it to be one of the strongest NHRIs in Africa. Although the legal framework governing the SAHRC is in substantial compliance with the Paris Principles, there are a few problematic provisions which may possibly inhibit the independence of the SAHRC. This thesis demonstrates that the SAHRC has considerable independence from executive branch control because the legal framework governing the SAHRC has various safeguards which protect it from arbitrary interference by government organs and other entities. Also, there are strong provisions especially in matters relating to appointments, accountability, and investigations. This thesis, however, notes that the allocation of funds is made by the legislature via the Ministry of Justice and Constitutional Development–this arrangement plays a great role in fettering the effectiveness of the SAHRC due to the inadequate level of funds allocated to it by the Ministry in practice.[767]

In view of the foregoing overall examination, this thesis provides the following recommendations which, if adopted, can significantly reduce the weak features in the TCHRGG and SAHRC legal frameworks and also provide useful

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[766] Brocato, *supra* note 14 at 400-401. The author discusses some of the factors affecting the effective performance of the TCHRGG.
[767] *5th Annual Report, supra* note 657 at 4.

recommendations for improvement of the laws governing similar institutions in Africa which operate in comparable circumstances.

2. A Way Forward: Recommendations

Critical areas that have been highlighted above as key levers for the control of NHRIs in Africa are those of appointment, funding, power of investigation, legal mandate and jurisdiction, accountability, and enforcement of recommendations. This thesis makes the following recommendations which can facilitate more effective operation of the TCHRGG, SAHRC, and other NHRIs in Africa.

A. Tanzania Commission for Human Rights and Good Governance

The following recommendations are intended to remedy the weak features of the TCHRGG. First, the process of appointment of TCHRGG members can be strengthened by including representatives from opposition political parties. Also, the law should be amended to give the legislature the power to play a greater role in the process of appointment of TCHRGG members. Further, the law should extend the period of tenure for commissioners from three to five years without the possibility of reappointment. This recommendation aims at remedying the situation where some commissioners may want to use their initial period of tenure to please the President to obtain reappointment.

Second, the law should be amended to require professional qualifications for the vice chairperson and assistant commissioners because the present law leaves open the possibility of selecting unqualified persons for these positions. Also, the law should state explicitly the exact number of commissioners and assistant commissioners. This will assist in curbing the possibility of selecting a smaller

number of commissioners and assistant commissioners and, thus, will increase the effective performance of the TCHRGG. Also, the law should provide explicitly that those TCHRGG members who held private offices prior their appointments should vacate these offices.

Third, the law should be amended to provide that the power to create the special tribunal which removes TCHRGG members should be vested in the legislature. Fourth, the law should permit the TCHRGG to draft its own budget and annual reports and to present them directly to the legislature for scrutiny, not via the Ministry of Justice and Constitutional Affairs. Also, the legislature should make a thorough assessment of the TCHRGG work and its financial needs. Fifth, the law should allow the legislature to remit directly adequate funds to the TCHRGG and not via the Ministry of Justice and Constitutional Affairs. These reforms would increase TCHRGG independence given executive control over the present arrangements. Sixth, a shortage of funds could be addressed by permitting the TCHRGG to create a trust fund for donations by individuals, organizations, and institutions, similar to the trust fund used by the SAHRC.

Seventh, the present law limits the power of TCHRGG investigations. These unnecessary limitations weaken the effective performance of the TCHRGG. Therefore, all clauses which limit the power of investigation should be amended. For example, the clause which allows the President to halt the TCHRGG investigations at any time should be removed, and the law should provide that the President cannot interfere in the TCHRGG investigations. The law should also permit the TCHRGG to investigate both the Presidents of the United Republic of Tanzania and of Zanzibar.

These reforms are intended to increase TCHRGG independence and control over its investigations, and provide a means of keeping presidential abuse of powers in check. Also, the clause which requires that all matters relating to human rights violations should be instituted in the High Court of Tanzania for hearing by a full bench of judges should be amended to allow any court of law in the tier to hear such cases using only a single judge or magistrate. This reform opens up the possibility of cases involving violations of human rights to be heard and determined expeditiously.

B. South Africa Human Rights Commission

The following recommendations are aimed at remedying the weak features observed in the legal framework governing the SAHRC. First, the law neither requires professional qualifications nor human rights experience of SAHRC members. This leaves open the possibility that unqualified persons will be selected. It is, thus, important that the law should be amended and state explicitly the required professional qualifications for SAHRC members.

Second, the power to determine salaries, conditions of service, and period of tenure of the SAHRC members is vested in the President. Executive control over these matters has negative implications for SAHRC independence. Therefore, it is important that the law be amended and provide explicitly that the power to determine salaries, conditions of service, and period of tenure for SAHRC members is vested in the legislature.

Third, the SAHRC is affected by lack of adequate funds for its operations. The present arrangement requires the SAHRC to submit its budget to the Ministry of Justice and Constitutional Development for scrutiny. This arrangement has affected

negatively the SAHRC performance due to reduction of funds allocated by the responsible Ministry. This research recommends that the law should be amended to allow the SAHRC to draft its own budget and submit it directly to the legislature and not via the Ministry of Justice and Constitutional Development. Also, the legislature should make a comprehensive assessment of the SAHRC's work and its financial needs, and then allocate the necessary funds for SAHRC operations. Also, the law should require that professional and/or experienced persons in matters of management be selected for the management positions so as to improve internal management of the SAHRC.

Fourth, the present law allows the SAHRC to create *ad hoc* rules of procedure for admissibility of complaints and the conduct of its proceedings. The law should require that the SAHRC establish clear rules of procedure for admissibility of complaints and the conduct of its proceedings. If implemented, this recommendation will limit the possibility of arbitrary and biased decisions.

C. Other National Human Rights Institutions in Africa

The following general recommendations are intended to eradicate weak features in the legal frameworks of other NRHIs in Africa:

First, research in this thesis demonstrates that the majority of NHRIs are not enshrined in the constitutions of their countries, and many institutions exist by decree of the executive branch of government.[768] This thesis recommends that it is of significant importance that the legal mandate of a NHRI should be enshrined in the country's constitution and/or supported by legislation. This proposal is intended to

[768] Human Rights Watch, *supra* note 10 at 14. See also Appendix I at 171-172.

guarantee stronger legal protection against arbitrary abolition of the NHRI and/or its operations, or other restrictions by the executive branch of government.

Second, those legal frameworks which do not contain express appointment procedures should be amended to provide for appointment procedures for members of NHRIs. The enacted procedures should not give the executive branch control over appointment of NHRI members. Rather, a representative body such as the legislature should be given control over the process of appointment. The governing law also should expressly provide for the criteria of appointment to ensure that qualified and independent persons are selected. In establishing the criteria for appointment, experience and commitment to the human rights cause should be among the essential criteria.[769] The laws for all NHRIs in Africa should include provisions requiring pluralistic representation on both the appointing body and the NHRI.

Third, this thesis observes that most NHRIs in Africa rely primarily on funds allocated by a government department and secondarily on external donor funding. This thesis recommends that there should be deliberate efforts to incorporate provisions in the legal frameworks of NHRIs that specifically address the issue of funding and which ensure that NHRIs have the power to draft and control their own budgets and answer directly to a representative body such as the legislature which should finally determine their budget.[770] Also, the legal frameworks should ensure that governments provide NHRIs with sufficient resources to enable them to fulfill their functions. This is particularly important in Africa where many NHRIs have been

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[769] *Performance & legitimacy*, *supra* note 147 at 112.
[770] *Handbook*, *supra* note 2 at 11, para. 74.

given multiple mandates. Also, NHRIs should be able to create strategies for raising funds for their human rights activities such as establishing trust funds.[771]

Another source of funding for NHRIs in Africa comes from external donors. This thesis recommends that external financial support from potential external donors should be considered as supplementary resources. Therefore, NHRIs should not have to depend primarily upon external donors for their operations. They should be able to obtain the predominant part of the funds needed to operate effectively from their respective legislatures. Also, the governing law should provide that the government department responsible for the NHRI does not use funds allotted for the NHRI for other purposes. Alternatively, and preferably, a NHRI should be accountable purely to the legislature, as an office of the legislature, to avoid ministerial control altogether. Also, external donors should extend support to NHRIs in Africa contingent on their established records of protecting and promoting human rights. Support can be provided to those NHRIs which clearly have demonstrated the will and capability to achieve the goal of protecting and promoting human rights. Also, external donors should publicly criticize NHRIs which are weak and ineffective.[772]

Fourth, this thesis has noted that the majority of NHRIs in Africa do have powers of investigation. However, investigatory powers are often limited in many respects. It is recommended that the legal frameworks of NHRIs in Africa should be amended to minimize provisions which limit the powers of investigation of NHRIs and provide for adequate investigative powers. Adequate powers of investigation should also include *suo moto* powers pursuant to which the institutions can investigate

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[771] *4th Annual Report, supra* note 658 at 26.
[772] Human Rights Watch, *supra* note 10 at 90.

human rights violations on their own initiative. For example, this will enable NHRIs to investigate matters affecting vulnerable persons who are often unwilling or unable to complain such as rural women and children. Also, those legal frameworks which do not explicitly vest powers of investigation in the NHRIs (such as Algeria, Chad, Morocco, Niger, Senegal, and Sierra Leone) should incorporate such powers so as to enable them function more effectively.

Fifth, this thesis argues that most NHRIs in Africa are primarily accountable to the executive branch rather than to the legislature. It is recommended that legal frameworks governing NHRIs should ensure that NHRIs become accountable to the legislature rather than to the executive branch. For example, a number of classical ombudsmen, HHRO, and HRCs in other parts of the world are established as offices of the legislature and are accountable to it. This is to emphasize their independence from the executive branch.[773] Also, NHRIs should be accountable to the general public through the provision of regular public reporting. Accordingly, NHRIs with accountability ties to the legislature will be able to maintain distance from executive branch influences which could negatively affect the operations of these bodies. However, the executive branch should receive progress reports issued by NHRIs.

Lastly, this thesis demonstrates that most of the decisions given by NHRIs in Africa are non-binding and most of these NHRIs do not have enforcement mechanisms for ensuring compliance with their recommendations. It is recommended that in order to ensure compliance with recommendations by respondents, provisions should be made in legal frameworks giving NHRIs the power to institute an action in

[773] There are legislative ombudsmen in e.g. Canadian Provinces, United Kingdom, New Zealand, Australia, Denmark, Iceland, and the Netherlands. There are legislative HHRO in e.g. Finland, Norway, Spain, Slovenia, and Poland. There are legislative HRCs in e.g. Ethiopia, and Togo.

a court of law for the court to enforce their recommendations (as established in Kenya, Ghana and Tanzania). This is feasible where independence of the judiciary is guaranteed. In cases where there are problems with independence of the judiciary, governments in Africa should work to ensure that courts become independent and impartial. Although the power to institute court proceedings has been rarely given to NHRIs in Africa, giving such power to NHRIs will more effectively remedy the problem of executive non-compliance with NHRI recommendations. Alternatively, NHRIs should be given the power to refer cases for binding resolution by a specialized human rights tribunals set up for the purpose of handling only NHRIs cases.

It is equally important to strengthen non-legal factors which have a positive effect in improving the effectiveness of NHRIs in Africa. For example, national governments need to guarantee adequate resources for NHRI operations to enable them to function effectively. In addition, national governments should provide training to members of NHRIs and other staff on human rights issues. National governments in Africa should be willing to support and respond positively and expeditiously to NHRI activities, especially to NHRI recommendations arising out of their investigations and other work, and ensure that NHRIs are not politicized. NHRIs in Africa should forge a close relationship with the media and civil society organizations (especially those involved in the protection and promotion of human rights). Finally, strengthening both legal and non-legal factors affecting the independence and effectiveness of NHRIs in Africa should serve to promote a positive public perception of the benefits provided by such institutions.

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APPENDIX I

TABLE 1: INDICATING THE NATURE OF HHRO AND HRCs IN AFRICA

Country	Source of Authority	Appointing Body	Mandates	Powers of Investigation	Type of NHRI	Status of Decision	Sources of Funds as Enacted
Algeria	Decree	President	Human Rights	No	HRC	Non Binding	State
Angola	Constitution & Legislation	Legislature	Human Rights & Maladministration	Yes	HHRO	Non Binding	Government
Benin	Legislation	Minister of Justice	Human Rights	Yes	HRC	Non Binding	No Law Provides
Chad	Legislation	Prime Minister	Human Rights	No	HRC	Non Binding	No Law Provides
Cape Verde	Decree	Minister of Justice	Human Rights	No	HRC	Non Binding	No Law Provides
Cameroon	Decree	President	Human Rights	Yes	HRC	Non Binding	No Law Provides
Ethiopia	Constitution & Legislation	Legislature	Human Rights	Yes	HRC	Non Binding	Government
Ethiopia	Constitution & Legislation	Legislature	Good Governance & Human Rights	Yes	HHRO	Non Binding	Government
Gabon	Decree	President	Human Rights	Yes	HRC	Non Binding	Government
Gambia	Constitution & Legislation	President	Human Rights & Maladministration	Yes	HHRO	Non Binding	Government
Ghana	Constitution & Legislation	President	Human Rights, Good Governance, & Anti-Corruption	Yes	HHRO	Non Binding	Government
Kenya	Constitution & Legislation	President	Human Rights	Yes	HRC	Non Binding	Government
Lesotho	Constitution & Legislation	King	Human Rights & Anti-Corruption	Yes	HHRO	Non Binding	Government
Malawi	Constitution & Legislation	President	Human Rights	Yes	HRC	Non Binding	Government
Malawi	Constitution & Legislation	Committee	Human Rights	Yes	HHRO	Non Binding	Government
Mauritania	Decree	Prime Minister	Human Rights	Yes	HRC	Non Binding	Government
Mauritius	Legislation	President	Human Rights	Yes	HRC	Non Binding	State
Morocco	Decree	King	Human Rights	No	HRC	Non Binding	Government

TABLE 1: Continued.

Country	Source of Authority	Appointing Body	Mandates	Powers of Investigation	Type of NHRI	Status of Decision	Sources of Funds as Enacted
Namibia	Constitution & Legislation	President	Human Rights, Environments, & Anti-Corruption	Yes	HHRO	Non Binding	Government
Nigeria	Decree	President	Human Rights	Yes	HRC	Non Binding	No Law Provides
Niger	Constitution & Legislation	President	Human Rights	No	HRC	Non Binding	Government
Rwanda	Constitution & Legislation	President	Human Rights	Yes	HRC	Non Binding	State
Senegal	Legislation	Executive Committee	Human Rights	No	HRC	Non Binding	Government
Seychelles	Constitution & Legislation	President	Human Rights & Maladministration	Yes	HHRO	Non Binding	Government
Sierra Leone	Decree	President	Human Rights	No	HRC	Non Binding	Government
South Africa	Constitution & Legislation	President & Legislature	Human Rights	Yes	HRC	Non Binding	Government
Tanzania	Constitution & Legislation	President	Good Governance, Human Rights, & Maladministration	Yes	HHRO	Non Binding	Government
Togo	Constitution & Legislation	Legislature	Human Rights	Yes	HRC	Non Binding	Government
Tunisia	Decree	President	Human Rights	No	HRC	Non Binding	Government
Uganda	Constitution & Legislation	President	Human Rights	Yes	HRC	Non Binding	Government
Zambia	Constitution & Legislation	President	Human Rights	Yes	HRC	Non Binding	Government
Zimbabwe	Constitution & Legislation	President	Human Rights & Maladministration	Yes	HHRO	Non Binding	Government

Source: Legal Frameworks of HHRO and HRCs in Africa.
Note: There are other hybrid ombudsmen in Africa which do not have express human rights mandates such as Inspectorate General of Uganda, Public Protector of South Africa, and Mauritius Ombudsman.
Key:
NHRI: National Human Rights Institution
HRC: Human Rights Commission
HHRO: Hybrid Human Rights Ombudsman

APPENDIX II

TABLE 2: A List of Ombudsman and Hybrid Ombudsman (Without Express Human Rights Mandates) Offices in Africa

Country	Ombudsman	Country	Ombudsman
Angola	No	Madagascar	Yes
Algeria	No	Malawi	No
Benin	No	Mali	Yes
Botswana	Yes	Mauritania	Yes
Burkina Faso	Yes	Mauritius	Yes
Burundi	No	Morocco	Yes
Cameroon	Yes	Mozambique	No
Cape Verde	Yes	Namibia	No
Central African Republic	No	Niger	No
Chad	Yes	Nigeria	Yes
Comoros	No	Rwanda	Yes
Congo	Yes	Sao Tome	No
Dem. Republic of Congo	No	Senegal	Yes
Cote d'Ivoire	Yes	Seychelles	No
Djibouti	Yes	Sierra Leone	Yes
Equatorial Guinea	No	Somalia	No
Eritrea	No	South Africa	Yes
Ethiopia	No	Sudan	Yes
Gabon	Yes	Swaziland	No
Gambia	No	Tanzania	No
Ghana	No	Togo	No
Guinea	No	Tunisia	Yes
Guinea-Bissau	No	Uganda	Yes
Kenya	No	Zambia	Yes
Lesotho	No	Zimbabwe	No
Liberia	No		
Libya	No		
Total # of Yes	**23**	**Total # of No**	**29**

Sources: Various
Note: Some countries do not have any kind of NHRI, such as Burundi, Comoros, Equatorial Guinea, Guinea-Bissau, Libya, Mozambique, Sao Tome, Somalia, and Swaziland.

APPENDIX III

Table 3: Indicating the Nature of Powers of NHCs and HHRO with Express Human Rights Mandates in Africa

Country	1	2	3	4	5	6	7	8	9	10	11
Angola	X	X	X	X	X		X				
Algeria											X
Benin	X	X	X	X				X			X
Cameroon		X	X	X	X	X					X
Cape Verde							X				X
Chad				X			X				X
Ethiopia	X	X	X		X	X	X				X
Ethiopia	X	X	X	X	X	X	X		X		X
Gabon		X	X	X			X				X
Gambia		X	X	X		X	X	X	X	X	X
Ghana	X	X	X	X	X	X	X	X	X	X	X
Kenya		X	X	X	X	X	X	X	X	X	X
Lesotho	X	X	X	X	X	X	X		X		X
Malawi	X	X	X	X	X	X	X	X	X		X
Malawi	X	X	X	X	X	X	X				X
Mauritania				X							X
Mauritius	X	X	X	X	X	X	X	X	X		X
Morocco							X				X
Namibia	X	X	X	X	X	X	X	X	X		X
Niger				X			X				X
Nigeria	X	X	X	X							X
Rwanda		X	X				X				X
Senegal							X				X
Seychelles		X	X	X		X	X	X	X		X
Sierra Leone							X				X
South Africa	X	X	X	X			X	X	X		X
Tanzania	X	X	X	X	X	X	X	X	X	X	X
Togo	X	X	X	X		X	X				X
Tunisia							X				X
Uganda	X	X	X	X		X	X	X	X		X
Zambia	X	X	X	X		X	X	X	X	X	X
Zimbabwe		X	X	X		X	X		X		X
Total	**16**	**23**	**23**	**24**	**12**	**17**	**27**	**12**	**14**	**5**	**31**
%	**50**	**72**	**72**	**75**	**38**	**53**	**84**	**38**	**44**	**16**	**97**

Source: Legal Frameworks of HRCs and HHRO with Express Human Rights Mandates in Africa

Key

X. Indicates that the institution has the powers listed on that particular column.

1. Uses amicable means.

2. Conducts investigations.
3. A victim has a right to file a complaint.
4. There are limitations on the powers of investigations.
5. Powers of referrals.
6. Powers of obtaining relevant information and documents.
7. Powers of making recommendations.
8. Powers of bringing an action before the court of law.
9. Powers of judicial nature—serving summons require attendance of any person, or issue orders, or require any person to produce evidence.
10. Powers of issuing injunctions.
11. Powers of making publications of institution's operations.

APPENDIX IV

A. MANDATES OF TANZANIA'S COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE

(a) to promote in the country the protection and the preservation of human rights and of duties to the society in accordance with the Constitution and the laws of the land;
(b) to receive allegations and complaints in [sic] the violation of human rights generally;
(c) to conduct enquiries into matters involving the violation of human rights and the contravention of the principles of administrative justice;
(d) to conduct research into human rights, administrative justice and good governance issues and to educate the public about such issues;
(e) when necessary, to institute proceedings in court designed to terminate activities involving the violation of human rights or redress the right or rights so violated, or the contravention of the principles of administrative justice;
(f) to investigate the conduct of any person to whom or any institution to which the provisions of this section apply in the ordinary course of the exercise of the function of his office or discharge of functions in excess of authority;
(g) to investigate or inquire into complaints concerning practices or actions by persons holding office in the service of the government, public authorities or other public bodies, including private institutions and private individuals where those complaints allege abuse of power, injustice, unfair treatment of any person, whether complainant or not, in the exercise of their official duties;
(h) to visit prisons and places of detention or related facilities with a view to assessing and inspecting the conditions of the persons held in such places and making recommendations to redress the existing problems in accordance with the provision of this Act;
(i) to take steps to secure the remedying, correction, reversal or cessation of instances referred to paragraphs (e), (g), or (h) through fair and effective means, including the institution of legal proceedings;
(j) to provide advice to the government and to other public organs and private sector institutions on specific issues relating to human rights and administrative justice;
(k) to make recommendations relating to any existing or proposed legislation, regulations, or administrative provisions to ensure compliance with human rights norms and standards and with the principles of good governance;
(l) to promote ratification of or accession to treaties or conventions on human rights, harmonization of national legislation and monitor and assess compliance, within the United Republic, by the government

and other persons, with human rights standards provided for in treaties or conventions or under customary international law to which the United Republic has obligations;

(m) under the auspices of the government, to cooperate with agencies of the United Nations, the OAU, the Commonwealth and other bilateral, multilateral or regional and national institutions of other countries which are competent in the areas of protection and promotion of human rights and administrative justice;

(n) to make available such measures as may be appropriate for the promotion and development of mediation and reconciliation amongst the various persons and institutions who come or are brought before the Commission;

(o) to perform such other functions as may be provided for by any other written law.

(2) Without prejudice to the provisions of subsection (1), the Commission shall, generally in relation to members of the public, use Commission's [sic] good office to promote, protect and where necessary to provide assistance to persons whose human rights have or are in imminent danger of being violated

Source: Section 6 of the *Commission for Human Rights and Good Governance Act, 2001.*

B. MANDATES OF SOUTH AFRICA HUMAN RIGHTS COMMISSION

(a) shall develop and conduct information programmes to foster public understanding of this Act, Chapter 3 of the Constitution and the role and activities of the Commission;

(b) shall maintain close liaison with institutions, bodies or authorities similar to the Commission in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction;

(c) may consider such recommendations, suggestions and requests concerning fundamental rights as it may receive from any source;

(d) shall carry out or cause to be carried out such studies concerning fundamental rights as may be referred to it by the President, and the Commission shall include in a report referred to in section 118 of the Constitution a report setting out the results of each study together with such recommendations in relation thereto as it considers appropriate;

(e) and may bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.

Source: Section 7(1) of *South Africa Human Rights Commission Act, 1994.*

C. INVESTIGATION FUNCTION OF SOUTH AFRICA HUMAN RIGHTS COMMISSION

(a) conduct or cause to be conducted any investigation that is necessary for the purpose;

(b) through a member of the Commission, or any member of its staff designated in writing by a member of the Commission, require from any person such particulars and information as may be reasonably necessary in connection with any investigation;

(c) require any person by notice in writing under the hand of a member of the Commission, addressed and delivered by a member of its staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that such notice shall contain the reasons why such person's presence is needed and why any such article or document should be produced;

(d) through a member of the Commission, administer an oath to or take an affirmation from any person referred to in paragraph (c), or any person present at the place referred to in paragraph (c), irrespective of whether or not such person has been required under the said paragraph (c) to appear before it, and question him or her under oath or affirmation in connection with any matter which may be necessary in connection with that investigation.

Source: Section 9(1) of *South Africa Human Rights Commission Act, 1994.*